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In the Supreme Court of the United States

OCTOBER TERM, 1973

WILLIAM COUSINS, ET AL.,

Petitioners,

vs.

PAUL T. WIGODA, ET AL.,

Respondents.

On Writ Of Certiorari To The Illinois Appellate Court

BRIEF FOR PETITIONERS

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OPINIONS BELOW

The opinion of the Illinois Appellate Court is reported at 14 Ill. App.3rd 460, 302 N.E.2d 614 (1973), and is reproduced in the Appendix at A.-121.* The unreported in-

* The "A. ...." references are to the Appendix filed with this brief.

junction orders of the Circuit Court of Cook County, Chancery Division, affirmed by the Illinois Appellate Court, are reproduced at A.-84, A.-115.

JURISDICTION

The judgment of the Illinois Appellate Court was entered on September 12, 1973. On November 29, 1973, the Supreme Court of Illinois denied, without opinion, petitioners' timely motion for leave to appeal to that court the judgment of the Illinois Appellate Court. A Petition for Certiorari to the Illinois Appellate Court was filed in this Court on January 14, 1974, asserting jurisdiction in this Court to review the judgment of the Illinois Appellate Court pursuant to 28 U.S.C. § 1257(3). This Court granted the Petition on March 4, 1974.

CONSTITUTIONAL PROVISIONS INVOLVED

The provisions of the United States Constitution involved are Article VI, Section 2 (the Supremacy Clause) and the First and Fourteenth Amendments.

QUESTIONS PRESENTED

1. Whether the injunction orders issued by the Circuit Court of Cook County, and affirmed by the Illinois Appellate Court, against participation by petitioners as delegates to the 1972 Democratic National Convention were barred by the decisions of this Court and the Court of Appeals for the District of Columbia in *Keane* v. *National Democratic Party*.

2. Whether, as the Illinois Appellate Court held, state law exclusively governs the selection and seating of delegates to a National Political Party Convention, and participation in other National Party affairs, notwithstanding applicable rules and decisions of the duly authorized authorities of the National Political Party.

3. Whether an injunction against the participation in a National Political Party Convention, and in other National Party affairs, of persons seated in said Convention by its Credentials Committee, and by vote of the delegates to the Convention, violates the rights of free political association of said persons and said National Political Party and its members as guaranteed by the First and Fourteenth Amendments to the United States Constitution.

4. Whether petitioners' right to a fair hearing as guaranteed by the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution was denied in view of the public statements concerning this case made by the trial judge while the instant case was pending before the said trial judge, which statements demonstrated a gross bias and prejudice against petitioners.

STATEMENT OF THE CASE

Preliminary Statement

This case arises out of the contest between petitioners and respondents over which competing delegation should be seated to represent the Chicago districts at the 1972 Democratic National Convention which opened in Miami, Florida on Monday, July 10, 1972. This credentials contest was the subject of this Court's decision in *Keane* v. *National Democratic Party*, 409 U.S. 1 (1972) (considered together with the case involving the California credentials

contest and decided *sub nom. O'Brien* v. *Brown*), announced at a Special Term on the evening of Friday, July 7, 1972. That action was instituted by respondents in an effort to reverse the decision of the Democratic Party's Credentials Committee in favor of seating petitioners as the Chicago delegates.

This Court determined to stay the judgments of the United States Court of Appeals for the District of Columbia in both the Chicago and California cases stating that: "It has been understood since our national political parties first came into being as voluntary associations of individuals that the convention itself is the proper forum for determining intra-party disputes as to which delegates shall be seated." 409 U.S. at 4. This Court noted that its action "may well preclude any judicial review of the final action of the Democratic National Convention on the recommendation of its Credentials Committee" (*id.* at 5), but this Court emphasized "the large public interest in allowing the political processes to function free from judicial supervision." *Id.*

Petitioners submit that the July 7 decision of this Court established that, in the particular circumstances of this case, the Democratic National Convention—and not the courts—was to decide the Chicago credentials contest. Nothing in this Court's *per curiam* opinion suggested that it intended its stay order to permit relitigation of the issues adjudicated by the Court of Appeals in another judicial forum. On the contrary, this Court expressly stated that it acted to preserve the right of the National Convention "to accept or reject, or accept with modification, the proposals of its Credentials Committee." *Id.* at 3.

Nevertheless, this contest now comes before this Court again because, notwithstanding the July 7 decision of this

Court, on the next evening, Saturday, July 8, 1972, respondents (the unseated Chicago delegates who had themselves instituted the action which resulted in this Court's decision) sought and obtained from the Circuit Court of Cook County an injunction purporting to bar petitioners from participating in the Democratic National Convention which opened on Monday, July 10, 1972. Subsequent to the Convention, the Circuit Court of Cook County, on motion of respondents, commenced contempt proceedings in which petitioners are threatened with jail sentences for participation in the Democratic National Convention in alleged violation of the Circuit Court's injunction. In addition, on August 2, 1972, the Circuit Court of Cook County issued a supplemental order enjoining petitioners from participating in the selection of members of the Democratic National Committee from Illinois. (A.-115.) The orders of the Circuit Court of Cook County were upheld on appeal by the Illinois Appellate Court (First District).

The Contest Over the Chicago Seats at the 1972 Democratic National Convention

The challenge against the seating of respondents as the Chicago delegates to the 1972 Democratic National Convention was filed with the Acting Chairman of the Democratic Party's Credentials Committee on March 31, 1972. The challenge did not contest the fact that respondents had been elected at the Illinois primary in accordance with Illinois law, but rather alleged deliberate violation by respondents of National Party Rules relating to preprimary activities and other matters not covered by the Illinois law. Among other things, the challenge alleged that respon-

dents had engaged in closed and secret slatemaking in violation of National Party Rule C-6; that slatemaking and other affairs of the Chicago Democratic Party were conducted without published rules in violation of Rule A-4; and that in slatemaking and other party processes respondents discriminated against racial minorities, women and young people in violation of Rules A-1 and A-2. The National Party Rules were set out in the Official Call of the 1972 Democratic National Convention and are included in the Hearing Examiner's Report (A.-20.).

Under the National Democratic Party Rules, the Acting Chairman of the Credentials Committee appointed a Hearing Examiner to hear evidence on the challenge and determine whether National Party Rules had been violated. Cecil F. Poole, former United States Attorney for the Northern District of California, was appointed Hearing Examiner on the Chicago challenge.* Examiner Poole held hearings in Chicago on May 31, June 1 and June 8, 1972. Both petitioners and respondents were represented by counsel and oral and documentary evidence was received. The proceedings were reported by certified court reporters resulting in a transcript approximating 2,000 pages. More than 500 exhibits, including affidavits and other documents, were introduced. (A.-20.)

* Initially Mr. Louis F. Oberdorfer, a member of the bar of the District of Columbia, was appointed Hearing Examiner; however, Mr. Oberdorfer declined to serve after allegations were made by respondents at a pre-hearing conference that he had a conflict of interest with respect to the contest.

On June 25, 1972 the Examiner issued his Report finding that respondents had engaged in deliberate violations of National Party Rules set forth in the Convention Call. Among other things, the Examiner found that respondents had discriminated against racial minorities, women and young people "invidiously and substantially" (A.-38.) and that "the Party [in Chicago] has failed in its basic obligation to open up to fuller participation by those who have been excluded" (A.-23.). The Examiner expressly rejected any interpretation of the National Party Rules as involving a "quota" system, stating that "any such principle would be encumbered by grave doubt in any case." (A.-23.)

The Examiner further found:

> ". . . [T]he challenged slate of delegates [respondents] was selected outside the arena of public participation by, and given the massive support and endorsement of, the Democratic organization in Chicago . . . to the exclusion of other candidates not favored by the organization and this without written and publicized rules and with no notice to the public such as would permit interested Democratic electors to participate." (A.-21.)

> "[T]here was a clear concert of act and deed among officials of the regular party organization in Chicago . . . to accomplish the private selection of delegates, thereafter to put the full weight, authority, prestige and support of the organization behind the candidacies of those thus chosen, and to discourage and render ineffective efforts by those outside the penumbra of the party influence." (A.-22.)

> "[T]he violations of [the Rules] were deliberate, covert and calculated." (A.-22.)

On June 19, 1972, the Credentials Committee of the 1972 Democratic National Convention (consisting of 150 members representing the various state delegations) opened hearings in Washington, D.C. The Committee ultimately heard challenges to delegates from 26 states, of which the Chicago and California contests were the most highly publicized and intensely contested. The Committee heard argument from counsel for both petitioners and respondents on Friday, June 30, 1972 and, after debate, voted to sustain the Examiner's Report and to seat petitioners as the delegates from the Chicago districts in light of respondents' "deliberate, covert and calculated" violations of National Party Rules.*

A minority Credentials Committee report supporting respondents was filed. Thus the contest was ultimately decided on the floor of the National Convention itself. Petitioners and respondents debated the contest at caucuses of the various state delegations and the contest was the subject of intense public debate and political struggle during this period. At the opening session of the National Convention on Monday, July 10, 1972, after speeches and argument from both petitioners and respondents and their respective supporters, a motion was made to suspend the rules and seat both contesting delegations, splitting the votes; but that motion failed. The delegates to the Convention then voted to sustain the majority report of the

* As the Illinois Appellate Court notes (A.-127), petitioners consisted largely of the defeated candidates in the Illinois primary—i.e., those who had run for delegate and (unlike respondents) had not been found to have violated the National Party Rules. The number of such candidates was greater than the number of delegates in each district so caucuses were held in each district at which the defeated candidates selected the new delegates. (A.-80.)

Credentials Committee seating petitioners as the Chicago delegates.*

Respondents' Federal Court Action and This Court's Decision of July 7, 1972

On Monday, July 3, 1972, following the decision of the Credentials Committee, respondents petitioned the Federal District Court for the District of Columbia to reverse the Credentials Committee's decision and to order the National Democratic Party and the National Convention to seat respondents, and not petitioners, as the Chicago delegates. Respondents' complaint (originally filed May 19, 1972) requested of the Federal court among other things:

> "That this Court declare, adjudge and decree that Plaintiff and the Delegates [respondents] have been duly elected in accordance with the provisions of the Illinois Election Code, and that they are, therefore, entitled to take their seats as delegates and alternates to the 1972 Democratic National Convention and to function and participate fully therein without interference by or on behalf of Defendants." Complaint of Thomas E. Keane, et al. for Declaratory and Injunctive Relief, Civ. No. 1010-72 (D.C. Dist. Ct.) at p. 13.

* For views of the importance of the Democratic Party's final decision on the Chicago contest, see, e.g., Bickel, "Will the Democrats Survive Miami?" 167 *New Republic* at 18 (July 15, 1972) "[T]he [Democratic] Party will in the long run be strengthened by the decision in the Daley case, as any institution is strengthened which visibly and painfully submits itself to the process of law, and obeys the rules it has made for its own government"); Broder, "The Democrats' Dilemma," *The Atlantic Monthly* (March, 1974) at 31 (describing the critical reaction of many party "regulars" to the decision on the Chicago contest which Broder describes as the "central, defining scene" of the 1972 Democratic National Convention).

The District Court dismissed respondents' complaint on July 3, 1972. The District Court's dismissal was unanimously affirmed by the Court of Appeals for the District of Columbia Circuit on Wednesday, July 5, 1972. *Keane* v. *National Democratic Party*, 469 F.2d 563 (D.C. Cir. 1972). The Court of Appeals noted that "in approving the actions of the Credentials Committee in unseating the Illinois plaintiffs and seating an alternative delegation, we have acknowledged the National Party's right to impose requirements on the delegate selection process separate from and in addition to those imposed by State law." (A.-57.) The Court of Appeals further stated that:

> "The right of a national political party to determine the qualifications of delegates to its conventions, if exercised within the confines of the Constitution, cannot be defeated merely because an individual delegate has not violated state law in addition to a valid party regulation. To hold otherwise would severely limit the freedom of association of the party itself." (A.-54.)

Advised by counsel for petitioners at oral argument that even if respondents were unsuccessful in their Federal court action, respondents would seek to proceed in an Illinois state court to enjoin petitioners from participating in the National Convention on the ground that only the delegates elected under Illinois law could be seated, the Court of Appeals, having expressly rejected that claim, enjoined respondents "from taking action in any other court that would impair the effectiveness and integrity of the judgments of this Court." (A.-61.)

At the same time, in a companion case instituted by the delegates elected under California law who had been denied a portion of their Convention seats by the Credentials Committee, the Court of Appeals reversed the decision of the Credentials Committee on the ground that the Credentials Committee's decision on the California challenge was not made in accordance with applicable National Party Rules and violated the due process clause of the Fourteenth Amendment. (A.-41-51.) The National Democratic Party (seeking to uphold the 1972 National Convention's right to freely decide the contests) and respondents then sought relief from this Court.

On the evening of Friday, July 7, 1972, at a Special Term, this Court stayed the judgments of the Court of Appeals in both cases, stating that it did so in order to permit the decisions on both the Illinois and California contests to be made by the 1972 Convention. This Court's *per curiam* opinion noted that:

> "The particular actions of the Credentials Committee on which the Court of Appeals ruled are recommendations that have yet to be submitted to the National Convention of the Democratic Party. Absent judicial intervention, the Convention could decide to accept or reject, or accept with modification, the proposals of its Credentials Committee." 409 U.S. at 3.

This Court cited "the absence of authority supporting the action of the Court of Appeals in intervening in the internal determinations of a national political party, on the eve of its convention, regarding the seating of delegates" *Id.* at 4. This Court emphasized the historical right of the National Party Conventions to decide credentials contests:

> "Judicial intervention in this area traditionally has been approached with great caution and restraint. See *Irish* v. *Democratic-Farmer-Labor Party of Minnesota*, 399 F.2d 119 (CA8 1968), affirming 287 F. Supp. 794 (Minn. 1968), and cases cited; *Lynch* v. *Torquato*, 343 F.2d 370 (CA 3 1965); *Smith* v. *State*

Exec. Comm. of Dem. Party of Ga., 288 F.Supp. 371 (ND Ga. 1968). Cf. *Ray* v. *Blair*, 343 U.S. 214 (1952). It has been understood since our national political parties first came into being as voluntary associations of individuals that the convention itself is the proper forum for determining intra-party disputes as to which delegates shall be seated." 409 U.S. at 4.

This Court concluded:

> "In light of the availability of the convention as a forum to review the recommendations of the Credentials Committee, in which process the complaining parties might obtain the relief they have sought from the federal courts, the lack of precedent to support the extraordinary relief granted by the Court of Appeals, and the large public interest in allowing the political processes to function free from judicial supervision, we conclude the judgments of the Court of Appeals must be stayed." 409 U.S. at 5.

This Court's stay order had the effect of preventing enforcement of the California decision of the Court of Appeals against the 1972 Convention (enforcement of which would, as this Court noted, have "denie[d] to the Democratic National Convention its traditional power to pass on the credentials of the California delegates"). But this Court did not at that time reverse or vacate, but merely stayed, the judgments of the Court of Appeals. Nothing in this Court's opinion suggested that it intended its stay order to permit relitigation of the issues adjudicated by the Court of Appeals in another judicial forum. On the contrary, this Court expressly stated that it was acting to permit the political process of the Convention to function free from judicial supervision. This Court stated:

> "We recognize that a stay of the Court of Appeals judgments may well preclude any judicial review of the final action of the Democratic National Convention on the recommendation of its Credentials Committee. But, for nearly a century and a half the national political parties themselves have determined controversies regarding the seating of delegates to their conventions." 409 U.S. at 5.

The Court of Appeals' Decision of February 16, 1973

Subsequent to the Convention, on October 10, 1972, this Court (on motion of the National Democratic Party) vacated the judgment of the Court of Appeals for the District of Columbia in *Keane* v. *National Democratic Party* and remanded the case to the Court of Appeals for the District of Columbia for a determination as to whether it had become moot. *Keane* v. *National Democratic Party*, 409 U.S. 816 (1972).

On February 16, 1973, the Court of Appeals held, 475 F.2d 1287, that the case was moot insofar as it involved respondents' complaint against the seating of petitioners in the National Convention, stating:

> "In the period intervening since the action of the District Court [July 3, 1972] the 1972 Convention of the National Democratic Party, acting within its competence, seated at the Convention the delegation [petitioners] whose right thereto was contested by plaintiffs Keane, et al. [respondents] in the District Court." (*Id.* at 1288)

Thus, the Court of Appeals stated that, under the July 7 decision of this Court, the 1972 National Convention had the right to decide the Chicago credentials contest and to seat petitioners as the Chicago delegation. The Court of Appeals expressly reaffirmed the District Court's previous dismissal of respondents' complaint. (*Id.* at 1288)*

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* On February 22, 1973, respondents moved to have the Court of Appeals revise its opinion and vacate the judgment of the District Court arguing that "the Court erred in affirming the judgment of the District Court." The Court of Appeals denied respondents' motion.

No review was sought by respondents of the Court of Appeals' February 16 judgment.

The Court of Appeals was asked by petitioners to enjoin any further proceedings by respondents against petitioners in the Illinois courts. However, the Court of Appeals declined to do so stating it was of the opinion that "no exceptional circumstances appear to justify now the relief requested." (*Id.* at 1288)*

Respondents' State Court Action and the Injunctive Orders Appealed From Herein

Respondents instituted the state court action which is the subject of the instant case on April 19, 1972, requesting the Circuit Court of Cook County to enjoin prosecution of the challenge by petitioners on the ground that respondents, and no other persons, could lawfully participate in the National Convention as delegates from the Chicago districts. (A.-1.) On April 20, 1972, petitioners filed a petition for removal of the action to the Federal District Court for the Northern District of Illinois on the ground that respondents' assertion of the supremacy of state law in the selection of National Convention delegates was properly characterized as a claim under Federal law. On May 17, 1972, the Federal District Court issued an opinion holding that the Federal constitutional issues arose only in defense and therefore did not support removal. *Wigoda* v. *Cousins*, 342 F. Supp. 82 (N.D. Ill.), *aff'd per curiam*, No. 72-1384 (7th Cir. 1972). In his opinion on the remand question, District Judge Hubert L. Will noted:

* It may be noted that the National Democratic Party urged the Court of Appeals that direct appeal through the Illinois courts, rather than a collateral Federal injunction, provided petitioners an appropriate avenue of relief from the Illinois injunction orders. See also *Cousins* v. *Wigoda*, 409 U.S. 1201 (1972) (Mr. Justice Rehnquist, in Chambers).

> "This is not to suggest that the qualifications and eligibility of delegates to national political party conventions is properly determinable by state law or by state courts. If it were, each of the fifty states could establish qualifications of its delegates to the various party conventions without regard to party policy, an obviously intolerable result. *The proper forum for determination of the eligibility of delegates to serve at such a convention is the Credentials Committee of the party or the convention.*" (Emphasis added.) (A.-12.)

Despite the remand of the case, action in the state court was delayed as a result of intervening Federal proceedings, including a Federal injunctive action instituted by petitioners in the District Court for the Northern District of Illinois under 42 U.S.C. § 1983,* and thus none of the

* On May 25, 1972, Federal District Judge Frank J. McGarr granted a temporary restraining order (and subsequently a preliminary injunction) against prosecution by respondents of their state court action for an injunction against petitioners' participation in the political process of the National Democratic Party. *Cousins* v. *Wigoda*, Civil No. 72 C 1108 (N.D. Ill. May 25, 1972, June 9, 1972). On June 29, 1972 the Court of Appeals for the Seventh Circuit (in a 2-to-1 decision) vacated the District Court's injunction, citing principles of Federal-state comity. *Cousins* v. *Wigoda*, 463 F.2d 602 (7th Cir. 1972). On July 1, 1972, Mr. Justice Rehnquist denied a petition for a stay of the order of the Seventh Circuit. *Cousins* v. *Wigoda*, 409 U.S. 1201 (1972).

Immediately following the decision of the Seventh Circuit on June 29, 1972, the Circuit Court of Cook County did issue an *ex parte* temporary restraining order which purported to bar the submission of names of an alternative delegation to the Credentials Committee; however, that order subsequently expired by its terms and was not the subject of any further proceedings. On Wednesday, July 5, 1972, advised of the decision of the Court of Appeals for the District of Columbia Circuit that morning (see p. 10, *supra*), the Circuit Court of Cook County indefinitely stayed further proceedings in the state court action and there were no further proceedings in the state court until July 8, 1972, after this Court's decision of July 7, 1972.

actions of the Illinois state court which are the subject of the instant case occurred until after this Court's decision of July 7, 1972 in the Washington, D.C. Federal court proceeding instituted by respondents in an effort to reverse the decision of the Credentials Committee.

On Saturday, July 8, 1972, following the decision of this Court on July 7, 1972, respondents sought and obtained from the Circuit Court of Cook County the injunctive order purporting to bar petitioners from participating in the 1972 Convention. (A.-84.) The July 7 decision of this Court and the July 5 decision of the Court of Appeals were presented to the trial judge, and attorneys for petitioners argued that those decisions were controlling as to the issues in the case and barred judicial interference with the processes of the 1972 Democratic National Convention. (Transcript of Proceedings, July 8, 1972 at 25-30, 32 *et seq.* and related Exhibits.) Petitioners further argued that any injunction would violate constitutional rights of petitioners and the National Democratic Party. (*Id.* at 54 *et seq.*) The trial judge stated that he had read the opinion of this Court (*Id.* at 81-82), but nevertheless on the evening of Saturday, July 8, 1972 issued the initial injunction appealed from herein.

Post-Convention Actions of the Circuit Court of Cook County

Under the Rules of the National Democratic Party adopted at the 1972 Convention, the delegates seated at the Convention were entitled to choose the new Illinois members of the Democratic National Committee to serve until the 1976 National Convention. A caucus of the Illinois delegation was scheduled to be held in Chicago for this purpose on August 5, 1972, several weeks after the Convention. On August 2, 1972, the Circuit Court of Cook

County, as supplemental relief in this action, issued an order, also the subject of review herein, barring petitioners from participating in that caucus, although petitioners had been seated as the Chicago delegates by the 1972 Convention.* (A.-115.) As a result of the Circuit Court's order, respondents, and not petitioners, participated in the August 5 caucus. Petitioners immediately filed with the Democratic National Committee notice of intent to challenge the results of the August 5 caucus under National Party Rules and to call a new caucus to choose members of the Democratic National Committee in accordance with the Rules at such time as the order barring petitioners from exercising their rights as delegates granted by the 1972 Convention should be vacated on appeal.

Subsequent to the Convention, the Circuit Court of Cook County, on motion of respondents, has caused to be served on 62 of the petitioners rules to show cause why they should not be held in contempt for participation in the Democratic National Convention in violation of the July 8, 1972 injunction of the Circuit Court of Cook County. Criminal trials for contempt have been deferred by the Circuit Court of Cook County conditioned on rapid prosecution by petitioners of these proceedings. In re-

* At that time petitioners and the National Democratic Party sought emergency injunctive relief against the Illinois state court proceedings from the Court of Appeals for the District of Columbia Circuit; however, that court declined to intervene stating that it was "not an appropriate forum" for such proceedings. *Keane* v. *National Democratic Party*, Civil No. 72-1631 (D.C. Cir. August 3, 1972). Petitioners also unsuccessfully sought emergency relief from the Supreme Court of Illinois.

sponse to motions by petitioners, the trial judge has stated that jail sentences imposed will not exceed six months and that, therefore, petitioners have no right to trial by jury.

Public Statements by the Trial Court Judge

Subsequent to the issuance of the July 8, 1972 order and while the 1972 Convention was in progress, various newspapers reported *ex parte* interviews with the trial court judge, Daniel A. Covelli, with respect to the Chicago challenge. His statements display the judge's bias against petitioners in this case. Judge Covelli was quoted as advising respondents to seek to have his order enforced through proceedings in the Florida state courts as follows:

> "If I were Daley's lawyers I would file contempt papers down in Dade County (Florida) because that state should honor and enforce the orders of any other state." (*Chicago Daily News,* July 11, 1972 at p. 6) (Defendants' Motion to Vacate, Motion for Judge to Recuse Himself and Motion for Change of Venue, filed July 20, 1972, Exhibit B.)

Judge Covelli was further quoted in reference to the contest comparing the situation to that of Nazi Germany:

> "I'll tell you this: If McGovern is elected it's going to be another Nazi Germany. Remember when Hitler took over and all the young guys were behind him . . . and you know what he did to Germany." (*Chicago Daily News,* July 11, 1972 at p. 6) (*Id.*)

Judge Covelli has conceded that he discussed the case with newspaper reporters outside the presence of the parties. (Transcript of Proceedings, July 20, 1972 at pp. 24-26.)

Subsequent to the Convention, petitioners moved that Judge Covelli vacate his July 8 order and disqualify himself from any further proceedings in the case on the ground that his statements indicated a patent bias, preventing petitioners from obtaining a fair hearing and a fair trial. Judge Covelli denied the motion and has continued to act in the case, issuing the supplemental order of August 2, 1972 and instituting criminal contempt proceedings against petitioners for alleged violation of the order of July 8, 1972.

The Decision of the Illinois Appellate Court

On September 12, 1973, the Illinois Appellate Court (First District) upheld the July 8 and August 2 orders of the Circuit Court of Cook County. In rejecting petitioners' contentions, the Appellate Court asserted that "the law of the state is supreme and party rules to the contrary are of no effect" (A.-143.) and held that:

> "The right to sit as a delegate representing Illinois at the national nominating convention is governed exclusively by the Illinois election code." (A.-139.)

The Appellate Court further stated:

> "Once the delegates were chosen in a free, open and non-discriminatory primary election, it became the legal duty of the party to carry out the mandate of the electorate. Once elected, any question of the delegates' qualifications to hold office is beyond the authority of party functionaries; it is a legal right properly protected by the courts." (A.-144.)

The Appellate Court concluded:

> "We think the Convention, a voluntary association, was without power or authority to deny the elected delegates their seats in the Convention and most cer-

tainly could not seat people of their choice and force them upon the people of Illinois as their representatives, contrary to their elective mandate. Such action is an absolute destruction of the democratic process of this nation and cannot be tolerated." (A.-149.)

As noted earlier, on November 29, 1973, the Supreme Court of Illinois denied petitioners' motion for leave to appeal the decision of the Illinois Appellate Court.

SUMMARY OF ARGUMENT

I. The July 7, 1972 decision of this Court established the right, in the particular circumstances of this case, of the 1972 Democratic National Convention to decide the Chicago credentials contest. This Court's *per curiam* opinion, citing "the large public interest in allowing the political processes to function free from judicial supervision" (409 U.S. at 5), was explicit in this respect. Once this Court had spoken in the matter, the Circuit Court of Cook County had no power to issue any injunctive orders contrary to this Court's decision.

Even if the explicit language of this Court's opinion of July 7 were ignored, this Court's action in staying, but not at that time vacating, the July 5 judgment of the Court of Appeals for the District of Columbia—which judgment had sustained the decision of the Credentials Committee of the National Democratic Party to seat petitioners as the delegates from Chicago—did not alter the binding collateral estoppel and *res judicata* effect of that judgment so as to permit respondents to attack that judgment collaterally in the Illinois state courts. Nothing in the *per curiam* opinion of this Court

staying the judgments of the Court of Appeals suggested or intimated any intention to permit relitigation of the issues decided by the Court of Appeals in an Illinois court. To the contrary, this Court's opinion expressly stated that its action was intended to permit the Democratic National Convention to exercise the historical right of National Political Conventions to resolve controversies over the seating of their delegates. 409 U.S. at 5.

II. The judgment of the Illinois Appellate Court, upholding the injunction orders of the Circuit Court of Cook County on the grounds that the 1972 Democratic National Convention "was without power or authority" to deny respondents seats in the Convention, and that power to bar the seating of petitioners in the Convention was in fact vested in the Circuit Court of Cook County, represents an unprecedented assertion of judicial power and state law over the political processes of a National Party Convention. No court has ever before purported to enjoin persons from participating as delegates in a National Political Party Convention in accordance with that Convention's decision. Such an injunction is directly contrary to the rights of free political association of persons from throughout the nation who choose to associate together as members of a National Political Party.

If the Illinois Appellate Court is correct, then the courts of each of the fifty states have power to review the decisions of National Political Parties and to determine who should or should not be allowed to participate in National Party Conventions. Further, if the Illinois Appellate Court is correct that state law exclusively governs the right to participate in a National Nominating Convention, then any right of the National Parties to establish and enforce national rules, standards and principles—a

right which both National Political Parties have maintained and exercised for almost a century and a half—is abrogated. Such a holding is contrary to all historical and judicial precedent and is incompatible with the basic constitutional rights of citizens to engage in National Political Party activities.

III. During the course of the proceedings in the trial court, subsequent to the first injunction order involved, but prior to the issuance of the second order, the trial judge publicly advised respondents to enforce his initial injunction order in a Florida state court and compared the Chicago credentials contest to the situation which had developed in Nazi Germany. Petitioners were therefore denied the basic constitutional guarantee of a trial before an impartial and unbiased judge.

IV. This case does not present "moot or abstract" questions because (1) petitioners are threatened with jail sentences for alleged violation of the initial order of the Circuit Court of Cook County subject to review herein, (2) the supplemental order of the Circuit Court of Cook County (also subject to review herein) continues to bar petitioners from participating in the selection of Democratic National Committee members from Illinois to serve until 1976 and (3) the case raises recurring questions of continuing critical importance for the functioning of the American political party system.

ARGUMENT

I.

THE INJUNCTION ORDERS ISSUED BY THE CIRCUIT COURT OF COOK COUNTY, AND AFFIRMED BY THE ILLINOIS APPELLATE COURT, AGAINST PARTICIPATION BY PETITIONERS AS DELEGATES TO THE 1972 DEMOCRATIC NATIONAL CONVENTION WERE BARRED BY THE DECISIONS OF THIS COURT AND THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA IN KEANE v. NATIONAL DEMOCRATIC PARTY.

A. This Court's Action in Keane v. National Democratic Party, 409 U.S. 1 (1972), Established the Right of the 1972 Democratic National Convention to Decide the Chicago Credentials Contest.

The July 7, 1972 decision of this Court established the right of the 1972 Democratic National Convention—and not the courts—to decide both the Chicago and California credentials contests. This Court's *per curiam* opinion, citing "the large public interest in allowing the political processes to function free from judicial supervision," (409 U.S. at 5) was explicit in this regard. Having chosen to seek to reverse the Credentials Committee's decision on the Chicago contest by legal action in the Federal courts in Washington, D.C., and having lost in the District Court, the Court of Appeals and finally, at a rare Special Term, in the Supreme Court of the United States, respondents clearly were not entitled to relitigate the issues in an Illinois state court in an effort to obtain a dif-

ferent result. Once this Court had issued its order permitting the Chicago contest to be decided by the Democratic National Convention, the Circuit Court of Cook County had no power to issue an injunctive order contrary to this Court's decision.

The opinion of the Illinois Appellate Court upholding the Circuit Court of Cook County offers no basis for the Circuit Court's actions in the face of this Court's July 7 decision. Indeed, the sole discussion in the Illinois Appellate Court opinion of the explicit language of this Court's *per curiam* decision of July 7 consists of the following:

> "[T]he defendants contend the judgment of the Supreme Court staying the injunction of the Court of Appeals was intended solely to permit a determination of the issues to be made by the Democratic National Convention 'free from judicial intervention.' (*Keane* v. *The National Democratic Party*, (1972) 469 F.2d 563, *judgment stayed*, — U.S. —, 34 L.Ed. 2d 1.) The opinion does not say 'free from judicial intervention,' but says 'absent judicial intervention, the Convention could decide to accept or reject, or accept with modification, the proposals of its Credentials Committee.'[*] The court was discussing the Federal Courts and does not mention State laws, election of delegates or their rights, or the jurisdiction of State courts over their delegates. It must be recognized that the Circuit Court of Illinois was not intervening in the Convention, but only exercised its jurisdiction over the Illinois delegates and challengers under the Illinois Election Code." (A.-131-132.)

* The Appellate Court's characterization of this Court's opinion wholly ignores, among other things, this Court's express reference to permitting the political processes to function "free from judicial supervision." 409 U.S. at 5.

The Illinois Appellate Court's attempt to distinguish this Court's decision is invalid on its face. The Appellate Court states that "the Circuit Court of Illinois was not intervening in the Convention, but only exercised its jurisdiction over the Illinois delegates and challengers under the Illinois Election Code." (A.-132.) This is a distinction without a difference. The Illinois injunction against participation by petitioners in the National Convention was plainly "intervening in the Convention". Indeed that was its only and express purpose. If the purpose of the state court injunction had been effected, the 1972 Democratic National Convention would have been forced to seat respondents (or possibly to seat no delegates from Chicago). In view of the closeness of the Convention votes, it is entirely conceivable that the injunction could have affected the outcome of the Convention.* Moreover, the Circuit Court of Cook County has subsequently proceeded with contempt actions to punish petitioners for participation in the Convention. Such actions directly contravene the right of the Convention "to accept or reject, or accept with modification, the proposals of its Creden-

* If the Illinois court were correct, a California state court could similarly, on the eve of the 1972 Democratic National Convention, have dictated the outcome of the California credentials contest, and the state courts of the 49 other states would have comparable power, with the effect that the outcome of the national presidential nominating conventions of both political parties would frequently be determined by state court decisions. Prior to the 1952 Republican National Convention, for example, a state trial court in Georgia issued a last-minute decision regarding which of the two competing Georgia delegations was entitled to be seated at that Convention which, if the 1952 Republican Convention had been bound to follow it, might well have affected the Convention's outcome. (see pp. 58-60, *infra*)

tials Committee" (409 U.S. at 3) which this Court upheld in its July 7 decision.

The decision of the Illinois Appellate Court that "the Convention, a voluntary association, was without power or authority to deny the elected delegates their seats" (A.-149) is contrary to this Court's decision permitting the 1972 National Convention to deny seats to the elected delegates from both California and Illinois in accordance with the historical understanding "since our national political parties first came into being as voluntary associations of individuals that the convention itself is the proper forum for determining intra-party disputes as to which delegates shall be seated." 409 U.S. at 4.

There is also no basis for the suggestion of the Illinois Appellate Court that this Court's decision of July 7 was not concerned with "State laws, election of delegates or their rights" and that this Court's decision operated only to free the processes of the National Party from Federal and not state court intervention. (A.-132.) In both the Chicago and California cases, this Court was directly concerned with delegates elected in accordance with state law and this Court clearly acted to permit the 1972 National Convention, in the circumstances of the two cases, to refuse to seat such delegates. All of the principal grounds stated by this Court in its opinion apply by their terms to the prospect of state as well as Federal court action.

"[T]he large public interest in allowing the political processes to function free from judicial supervision," to which the July 7 opinion of this Court refers (409 U.S. at 5), is as applicable to the Circuit Court of Cook County as it is to the Supreme Court of the United States. The same

is true of the emphasis throughout this Court's opinion on the historical freedom under which "for nearly a century and a half the national political parties themselves have determined controversies regarding the seating of delegates to their conventions." (409 U.S. at 5.) The "[v]ital rights of association guaranteed by the Constitution" to which this Court refers (*id.* at 4) are equally threatened by state court action. Even more applicable to the actions of the Illinois court—since it acted on the night following this Court's decision—was this Court's emphasis upon the inadequate time available for judicial consideration of the issues on the merits, which consequently warranted judicial abstention and permitting the political process to go forward freely under the circumstances (*id.* at 3, 5.)

Petitioners submit that it was and remains clear that this Court intended, on July 7, 1972, to allow the National Convention to decide the contest, recognizing—in the circumstances of this case—that "the convention itself is the proper forum for determining intra-party disputes as to which delegates shall be seated." 409 U.S. at 4. The subsequently issued injunctions by the Circuit Court of Cook County, affirmed by the Illinois Appellate Court, were contrary to the July 7 decision of this Court.

In their Brief in Opposition to the Petition for Certiorari in this case, respondents offered an interpretation of this Court's decision of July 7, 1972 which is even more cryptic than that of the Illinois Appellate Court. Respondents state that:

> "[i]t is not reasonable to contend that this Court's explicit stay of an injunction [issued by the Court of Appeals for the District of Columbia] against the proceedings in the Circuit Court of Cook County, was,

in fact, intended to enjoin such proceedings in that court. Petitioners' interpretation does violence to the plain language of this Court's stay order." Respondents' Brief in Opposition to Petition for Certiorari at p. 9.

The short answer to respondents' contention is that petitioners do not contend that this Court's July 7 decision was "intended to enjoin" proceedings in the Circuit Court of Cook County. When this Court takes action in a case, it does not customarily issue an injunction to enforce that action, or, more specifically, to ensure that the unsuccessful litigants will not seek to relitigate the issues in another court and obtain relief contrary to this Court's decision. This Court assumes that state courts and other authorities "will give full credence" to its decisions without the necessity for the issuance of an injunction. See *Roe* v. *Wade*, 410 U.S. 113, 166 (1973). The plain fact is that the Illinois state courts did not, in the instant case, give "full credence" to this Court's decision of July 7, 1972.

B. This Court's Action on July 7, 1972 in Staying, But Not Vacating, the July 5 Judgment of the Court of Appeals for the District of Columbia Did Not Alter the Binding Collateral Estoppel and Res Judicata Effect of that Judgment So As to Permit Collateral Attack in the Illinois State Courts.

1. A stay of a Federal judgment does not alter its conclusiveness in other judicial forums.

Even if the explicit language of this Court's opinion of July 7, 1972 were ignored, under unambiguous Federal law

established by prior decisions of this Court, this Court's action in staying, but not at that time vacating, the July 5 judgment of the Court of Appeals for the District of Columbia did not alter the binding collateral estoppel and *res judicata* effect of that judgment so as to permit collateral attack upon that judgment in the Illinois state courts.

First. It has long been recognized that a judgment of a court of the United States must be accorded the same force and effect in a subsequent state court proceeding as that judgment is given in the rendering Federal forum. As this Court noted in *Embry* v. *Palmer*, 107 U.S. 3, 10 (1883): "[T]he judgments of the courts of the United States have invariably been recognized as upon the same footing, so far as concerns the obligation created by them, with domestic judgments of the States, wherever rendered and wherever sought to be enforced." See, *e.g.*, *Knights of Pythias* v. *Meyer*, 265 U.S. 30, 33 (1924) (judicial proceedings of Federal courts must be accorded the same full faith and credit by state courts as would be required in respect of the judicial proceedings of another State); *Deposit Bank* v. *Frankfort*, 191 U.S. 499, 516-517 (1903); *Hancock National Bank* v. *Farnum*, 176 U.S. 640, 645 (1900).

Second. This Court has consistently held that "whether a Federal judgment has been given due force and effect in the state court is a Federal question reviewable by this Court, which will determine for itself whether such judgment has been given due weight or otherwise." *Deposit Bank* v. *Frankfort*, *supra*, at 515. See, *e.g.*, *Toucey* v. *New York Life Ins. Co.*, 314 U.S. 118, 129 n.1 (1941). See also *Partmar Corp.* v. *Paramount Corp.*, 347 U.S. 89, 92 (1954). As Mr. Justice Bradley stated in *Dupasseur* v. *Rochereau*, 88 U.S. 130, 134 (1874):

> "Where a State court refuses to give effect to the judgment of a court of the United States rendered upon the point in dispute, and with jurisdiction of the case and the parties, a question is undoubtedly raised which . . . may be brought to this court for revision."

In *Stoll* v. *Gottlieb*, 305 U.S. 165, 167 (1938), this Court, in holding that the Supreme Court of Illinois had erroneously failed to give *res judicata* effect to orders of a Federal bankruptcy court, noted that "[p]rovisions declaring the supremacy of the Constitution and the extent of the judicial power and authorizing necessary and proper legislation to make the grants effective confer jurisdiction upon this Court to determine the effect to be given decrees of a court of the United States in state courts." See *Embry* v. *Palmer*, 107 U.S. 3, 9-10 (1883). See also *Blonder-Tongue* v. *University Foundation*, 402 U.S. 313, 324 & n.12 (1971) (in Federal question cases Federal law of *res judicata* is applied).

Third. The rule in the Federal courts is that a judgment, even if it has been stayed during the pendency of an appeal, is nevertheless entitled to *res judicata* and collateral estoppel effect until such time as the judgment is modified, reversed or vacated by an appellate court. As this Court stated in *Huron Corp.* v. *Lincoln Co.*, 312 U.S. 183, 189 (1941):

> "[I]n the federal courts the general rule has long been recognized that while appeal with proper supersedeas stays execution of the judgment, it does not—*until and unless reversed—detract from its decisiveness and finality.*" (Emphasis added.)

See, *e.g.*, *United States* v. *Munsingwear*, 340 U.S. 36, 38 (1950);* *Stoll* v. *Gottlieb*, *supra*, at 170 (where judgment of Federal court determines a Federal right, that decision is final until reversed by an appellate court or modified by the rendering court); *Deposit Bank* v. *Frankfort*, *supra*,

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* In *Munsingwear*, this Court quoted the "classic statement" of the rule of *res judicata* enunciated in *Southern Pacific R. Co.* v. *United States*, 168 U.S. 1, 48-49 (1897):

> "The general principle announced in numerous cases is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, *so long as the judgment in the first suit remains unmodified.*" 340 U.S. at 38. (Emphasis added.)

The first Mr. Justice Harlan went on, in *Southern Pacific*, to explicate the underlying rationale of the *res judicata* doctrine:

> "This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for, the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them." 168 U.S. at 49.

See *Williamson* v. *Columbia Gas & Electric Corp.*, 186 F.2d 464, 469 (3d Cir. 1950), where Judge Goodrich noted that "[t]he purpose of the principle of res judicata is to end litigation. The theory is that parties should not have to litigate issues which they have already litigated or had a reasonable opportunity to litigate." See generally Vestal, "Res Judicata/Preclusion: Expansion," 47 So. Cal. L. Rev. 357 (1974).

at 510-520; *Railway Co.* v. *Twombly,* 100 U.S. 78 (1879) (writ of error to Supreme Court, with duly approved and accepted supersedeas bond, does not vacate judgment below, which continues in force until reversed); *Woods Exploration & Producing Co.* v. *Aluminum Company of America,* 438 F.2d 1286, 1315-1316 (5th Cir. 1971). See also *Denham* v. *Shellman Grain Elevator,* 444 F.2d 1376, 1380 (5th Cir. 1971); *Prager* v. *El Paso National Bank,* 417 F.2d 1111, 1112 (5th Cir. 1969).

Professor Moore has summarized the law regarding the *res judicata* and collateral estoppel effect of unreversed judgments as follows:

> "A question more frequently encountered is whether conclusive effect in other litigation ought to be given a judgment from which an appeal has been taken. . . . *The federal rule is that the pendency of an appeal does not suspend the operation of an otherwise final judgment as res judicata or collateral estoppel,* unless the appeal removes the entire case to the appellate court and constitutes a proceeding de novo. *This is true even if the appeal is taken with a stay or supersedeas; these suspend execution of the judgment, but not its conclusiveness in other proceedings.* If the appellate court is limited to consideration of the trial record and to affirming, reversing, vacating or modifying the judgment under review, *the judgment stands as res judicata of the cause of action adjudged, and is entitled to collateral estoppel effect, until reversed, vacated or modified.* Thus a judgment either for plaintiff or defendant, although an appeal is pending, precludes another action between the same parties or their privies on the same cause of action; and in litigation on a different cause of action, is conclusive in favor of the winning litigant of all material issues that were litigated and adjudicated by the trial court's judgment." 1B Moore's Federal Practice ¶ 0.416[3], at pp. 2252-54. (Emphasis added and citations omitted.)

It should be emphasized that in its decision of July 7, 1972 this Court did not reverse or vacate the judgment of the Court of Appeals. On the contrary this Court stated that it was unwilling in the limited time available to render a final decision on the merits. 409 U.S. at 3.

This Court vacated the judgment of the Court of Appeals for the District of Columbia, and remanded the case to that Court for further proceedings, on October 10, 1972, only *after* the 1972 Democratic National Convention had been concluded and *after* both of the injunction orders at issue here were entered by the Circuit Court of Cook County. Thus, at the time the Circuit Court of Cook County entered both of its injunction orders and the 1972 Democratic National Convention took place, the procedural posture of this case was that the judgment of the Court of Appeals for the District of Columbia had been stayed by this Court, but had neither been reversed, vacated or modified by this Court. In these circumstances, the Illinois state courts clearly erred in permitting relitigation of the issues decided by the Court of Appeals. *E.g., Stoll* v. *Gottlieb, supra; Deposit Bank* v. *Frankfort, supra.*

2. The reasons given by the Illinois Appellate Court for rejecting the res judicata effect of the Court of Appeals judgment are erroneous.

The Illinois Appellate Court advanced a number of reasons for not accepting the *res judicata* effect of the Court of Appeals' judgment, all of which are erroneous.

The stay of the Court of Appeals' judgment did not alter its res judicata effect. The Illinois Appellate Court initial-

ly stated that "[c]onsidering first the stay order [entered by this Court on July 7, 1972], we hold it completely froze the order of the Court of Appeals, including the injunction order directed to the Circuit Court of Illinois, thereby allowing the Circuit Court to proceed." (A.-132.) Whether or not the Illinois Appellate Court was correct in its assertion that the stay order "froze the order of the Court of Appeals, including the injunction order," the conclusion that the stay order permitted the Circuit Court of Cook County to relitigate the issues previously decided by the Court of Appeals is simply a *non sequitur*. After this Court issued its stay order, the judgment of the Court of Appeals nevertheless remained outstanding, having been neither reversed, vacated or modified by this Court. As previously indicated (see pp. 30-33 *supra*), this Court has unequivocally held that a stayed, but unreversed, unvacated, and unmodified, judgment of a Federal court is entitled to *res judicata* and collateral estoppel effect.

The subsequent vacating of the Court of Appeals' judgment did not alter its res judicata effect at the time of the 1972 Democratic National Convention. The Illinois Appellate Court held that when this Court vacated the judgment of the Court of Appeals on October 10, 1972, the order of the Court of Appeals was rendered "non-existent and a nullity, as if it never existed." (A.-133.) The Illinois Appellate Court cited no authority for this proposition which, at a minimum, is both misleading and confusing in the context of the present case. At the time that the Circuit Court of Cook County entered the injunction orders that are now presented to this Court for review—and at the time the 1972 Democratic National Convention and the actions of petitioners, which are allegedly contemptuous of those orders, took place—the judgment of the

Court of Appeals remained outstanding (although stayed by this Court), and the Illinois Circuit Court therefore erred in refusing to respect the effectiveness of that judgment. *E.g., Deposit Bank* v. *Frankfort, supra,* at 510-515, and cases cited therein. See generally pages 28-33, *supra*. To argue, as did the Illinois Appellate Court, that the judgment of the Court of Appeals is to be treated "as if it never existed" is simply to contend that the law as established at the time of the Circuit Court's orders—and at the time of the actions of petitioners which are allegedly violative of the said injunctions—is to be ignored.

On February 16, 1973 the Court of Appeals for the District of Columbia reaffirmed the dismissal of respondents' complaint against the seating of petitioners in the 1972 Democratic National Convention. The Illinois Appellate Court stated that "[o]n February 16, 1973, the Court of Appeals [for the District of Columbia] determined the issues before it were moot and joined in the finding previously entered by the District Court for the District of Columbia, wherein the [petitioners] were denied the injunctive relief which they sought." (A.-133.) In fact, in its *per curiam* decision of February 16, 1973, 475 F.2d 1287, the Court of Appeals stated the following:

> "In the period intervening since the action of the District Court [July 3, 1972] the 1972 Convention of the National Democratic Party, acting within its competence, seated at the Convention the delegation whose right thereto was contested by plaintiffs, Keane et al., in the District Court. Insofar as the complaint involved such right of representation the case thus became and is now moot.
>
> "Insofar as the complaint involves questions as to rights of the competing delegates to post-Convention representation in National Democratic Party matters,

we think the case is not moot. This court being advised, however, that these questions are pending before the Credentials Committee of the National Committee of the Party, we find no equitable basis upon which the District Court or this court should now intervene by declaratory or injunctive relief.

"Insofar as the case involves the request for injunctive or other relief sought by intervenor-defendants, Cousins et al., or previously though no longer sought by the National Democratic Party et al., defendants, we are also of the opinion that no exceptional circumstances appear to justify now the relief requested." (475 F.2d at 1288)

Thus, the Court of Appeals, on remand from this Court, stated that the Democratic National Convention had "act[ed] within its competence" in seating petitioners. As to post-Convention matters involving the National Democratic Party, and as to the collateral impact of its earlier judgment in the Illinois state court proceedings, the Court of Appeals did not find that the case was moot but denied relief on other grounds, not going to the merits.

The question of the present mootness of the case before the Court of Appeals makes no difference insofar as the *res judicata* effect of the Court of Appeals' judgment prior to the time that that judgment was vacated is concerned. At the time the Circuit Court of Cook County issued its injunctions and the actions of petitioners allegedly contemptuous thereof took place, the judgment of the Court of Appeals was outstanding, valid and binding, having not been reversed, vacated, or in any manner modified by this Court.

Furthermore, no support for the Illinois Appellate Court's view can be obtained from the fact that the Court

of Appeals on February 16, 1973, denied injunctive relief which had been sought by petitioners. The Court of Appeals expressly stated that it was denying injunctive relief, not because the case was "moot," but rather because of the absence of "exceptional circumstances" which would justify Federal intervention in pending state court proceedings.*

Finally the Court of Appeals on February 16, 1973, on remand from this Court, did not vacate the judgment of the District Court, and order that the case be dismissed as moot, but rather *affirmed* the judgment of the District Court dismissing respondents' complaint. (475 F.2d at 1288) The action of the Court of Appeals on February 16, 1973 in *affirming* the District Court's judgment of dismissal of respondents' complaint (with respect to which no review was sought in this Court) clearly preserves the *res judicata* effect of that judgment of dismissal.** (Pertinent portions of respondents' complaint filed in the District Court for the District of Columbia, the dismissal of

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* As noted earlier, the National Democratic Party urged the Court of Appeals that direct appeal through the Illinois courts, rather than a collateral Federal injunction, provided petitioners an appropriate avenue of relief from the Illinois injunction orders. See also *Cousins* v. *Wigoda*, 409 U.S. 1201 (1972) (opinion of Mr. Justice Rehnquist, in Chambers).

** See *United States* v. *Munsingwear*, 340 U.S. 36 (1950), a case in which the United States filed complaints alleging violations of a regulation fixing the maximum price of commodities that the defendant sold and seeking both injunctive relief and treble damages. The equity aspect of the Government's cases was tried first, and the trial court concluded that the respondent's prices complied with the applicable regulations. On appeal, the Court of Appeals dis-

(Footnote continued)

which was affirmed by the Court of Appeals for the second time on February 16, 1973, are quoted at p. 9, *supra*.)

In fact, the Illinois Appellate Court established a consistent pattern of ignoring the judgments of the Court of Appeals for the District of Columbia. It did so in the first

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(Footnote continued)

missed the case as moot because, while the case was pending on appeal, price restrictions were removed on the commodity in question. The defendant then moved in the District Court to dismiss the treble damage actions on the ground that the unreversed judgment of the District Court in the injunction suit was *res judicata* as to the damage suits. The motion was granted by the District Court and affirmed by the Court of Appeals, whose judgment was in turn affirmed by this Court. In holding that the judgment of the District Court was entitled to *res judicata* effect, notwithstanding the fact that the case had been rendered moot while the appeal was pending, this Court noted that:

> "the question whether the respondent had sold the commodities in violation of the federal regulation, having been determined in the first suit, is therefore laid at rest by a principle which seeks to bring litigation to an end and promote certainty in legal relations . . . [u]nless the dismissal of the appeal on the ground of mootness . . . warrants an exception to the established rule." 340 U.S. at 38.

This Court held that "we see no reason for creating the exception" to the general principles of *res judicata* (*id.* at 39), noting that the government could have sought to vacate or reverse the judgment below and remand to the District Court with directions to dismiss. Because the Government had not sought this relief, this Court held that the initial judgment of the District Court was *res judicata*, noting that the case "illustrates not the hardship of *res judicata* but the need for it in providing terminal points for litigation." 340 U.S. at 41. Moreover, this Court noted that "[d]enial of a motion to vacate could bring the case here. Our supervisory power over judgments of the lower federal courts is a broad one." *Id.* at 40.

instance by sustaining the two injunction orders of the state trial court which were issued while the July 5, 1972 judgment of the Court of Appeals was outstanding. Moreover, after the Court of Appeals, on February 16, 1973, upon remand from this Court, decided, *inter alia*, that the Democratic National Convention had "act[ed] within its competence" in determining to seat petitioners as the Chicago delegates, the Illinois Appellate Court took it upon itself to review the decision of the Democratic National Convention (A.-138.) and asserted a diametrically opposing view in holding that the Convention was "without power or authority to deny [respondents] their seats in the Convention." (A.-149.)

Respondents Were Parties to the District of Columbia Action and the Issue Involved in the Instant Case Was Adjudicated by the Court of Appeals for the District of Columbia. As a further reason why the judgment of the Court of Appeals for the District of Columbia, which had been stayed but not vacated by this Court, was not entitled to *res judicata* or collateral estoppel effect in the Circuit Court of Cook County, the Illinois Appellate Court stated that it "find[s] a near total lack of identity as to either issues or parties." (A.-133.) This argument is patently invalid as to both issues and parties. The Illinois Appellate Court concedes that the plaintiff class in both the Washington, D.C. case and the present case is precisely the same—that is, the challenged delegation, respondents herein. (A.-134.) Moreover, the ten individuals who initiated the challenge were defendants in both cases. After the full challenging delegation was selected, the additional members of that delegation were joined as additional parties defendant in this state court proceeding; but the ten original challengers clearly had the same interest as, and acted on behalf of, the full challeng-

ing delegation in the Washington, D.C. proceeding. Cf. *Hart Steel Co.* v. *Railroad Supply Co.*, 244 U.S. 294, 298 (1917). The National Democratic Party was a defendant in the Washington litigation, although it was not a party defendant in the Illinois state court proceedings; but clearly the presence of an additional party defendant in the Washington proceedings could not undermine the conclusiveness of the judgment of the Court of Appeals. Indeed, the Court of Appeals expressly noted in its opinion of July 5, 1972 that "all interested parties [were] represented in the federal forum." (A.-60.)

Even if it were assumed that there was some significance in the fact that the parties defendant in the Washington Federal court and Illinois state court litigation were not identical, this factor would be irrelevant in determining the *res judicata* and collateral estoppel effect of a Federal court judgment issued by a Washington, D.C. court.* The

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* As previously noted, in Federal question cases, the Federal law of *res judicata* is applied. *Blonder-Tongue* v. *University Foundation*, 402 U.S. 313, 324 & n.12 (1971). The well-established companion principle is that the credit which a judgment must receive is determined by the law of the rendering forum, *Caterpillar Tractor Co.* v. *International Harvester Co.*, 120 F.2d 82, 85-86 (3rd Cir. 1941), for "[o]ne of the strongest policies a court can have is that of determining the scope of its own judgments." *Kern* v. *Hettinger*, 303 F.2d 333, 340 (2nd Cir. 1962). See *Magnolia Petroleum Co.* v. *Hunt*, 320 U.S. 430, 439 (1943) (recognizing the "salutary principle of the common law that a litigation once pursued to judgment shall be as conclusive of the rights of the parties in every other court as in that where the judgment was rendered"); *Restatement, Conflict of Laws, Second* §§ 93-95 (1971); R. Leflar, *American Conflicts Law* 166-171, 176-177 (1968). See also 1B *Moore's Federal Practice*, ¶ 0.416[3], at p. 2256, and cases cited therein (conclusiveness of a judgment pending appeal governed by law of the rendering forum).

Court of Appeals for the District of Columbia, in a series of decisions, has abolished the requirements of "privity among defendants" and "mutuality in the operation of the judgment's estoppel" where "the judgment is invoked defensively against a party or his privy who is reasserting essentially the same cause of action against a different person." *Lobel* v. *Moore*, 417 F.2d 714, 716-17 (D.C. Cir. 1969), and cases cited therein. In *Lobel* the Court of Appeals stated:

> "[I]t is not at all surprising to find a growing number of well considered cases holding that irrespective of privity among defendants and despite nonmutuality in the operation of the judgment's estoppel, a prior adjudication may be used to resist resurrection of the old cause of action against a new defendant.
>
> "Especially in these times when all courts, including our own, are struggling with crowded and growing dockets, we are sensitive to the persuasive force of these precedents and the cogent reasons underlying them. And our own jurisprudence leaves us free to pursue a similar course, for the rule of mutuality, which frequently has appeared as something of an obstacle elsewhere, is not embedded in the decisions of this court. On the contrary, without so much as a hint that mutuality was a problem, we have sometimes permitted nonparties to judgments to assert their binding effect against those who were parties to it." 417 F.2d at 717. (Footnote omitted.)

More recently, this Court in *Blonder-Tongue* v. *University Foundation*, 402 U.S. 313 (1971), abolished the doctrine of mutuality of estoppel, in the context of multiple patent infringement suits, questioning "whether it is any longer tenable to afford a litigant more than one full and fair opportunity for judicial resolution of the same issue."

Id. at 328.* In the course of its opinion, this Court quoted with approval the test established by Justice Traynor in *Bernhard* v. *Bank of America Nat. Trust & Savings Ass'n*, 19 Cal.2d 807, 813, 122 P.2d 892, 895 (1942):

> " 'In determining the validity of a plea of res judicata three questions are pertinent: Was the issue decided in the prior adjudication identical with the one presented in the action in question? Was there a final judgment on the merits? Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?' " 402 U.S. at 323-324.

With regard to identity of issues, the Illinois Appellate Court was simply wrong in its assertion that the issues decided in the Washington, D.C. litigation did not include the question subsequently decided in the Illinois state court.** In both instances, the applicability of the Illinois

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* See *Hart Steel Co.* v. *Railroad Supply Co.*, 244 U.S. 294, 299 (1917), where this Court noted that the doctrine of *res judicata* "is a rule of fundamental and substantial justice, 'of public policy and of private peace,' which should be cordially regarded and enforced by the courts to the end that rights once established by the final judgment of a court of competent jurisdiction shall be recognized by those who are bound by it in every way, wherever the judgment is entitled to respect."

** The opinion of the Illinois Appellate Court may be read to hold that there must be an identity of *all* issues before *res judicata* may be asserted. This view is clearly wrong insofar as it is applied to determine the *res judicata* effect of Federal judgments. As this Court stated in *Partmar Corp.* v. *Paramount Corp.*, 347 U.S. 89, 90-91 (1954):

> "We have often held that under the doctrine of *res judicata* a judgment entered in an action conclusively settles that action as to all matters that were or might have been litigated or adjudged therein. But a prior judgment between the parties has been held to operate as an estoppel in a suit on a cause of action different from that forming the basis for the original suit only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. This latter aspect of *res judicata* is the doctrine of collateral estoppel by judgment, established as a procedure for carrying out the public policy of avoiding repetitious litigation." (Citations omitted.)

Election Code to the delegate-selection process—and whether that Code exclusively governed the qualifications of delegates to a National Party Convention—was at issue. The Illinois Appellate Court sought to distinguish the prior adjudication of the Court of Appeals for the District Court of Columbia by quoting the statement of that Court, wrenched from its context, to the effect that "No violation of Illinois law is at issue here." (A.-134.) In fact, the Court of Appeals made that statement in the context of considering, and expressly rejecting, respondents' argument that their election under Illinois law required that they be seated in the National Democratic Convention, despite the Rules of the National Democratic Party. The full quotation from the Court of Appeals' opinion reads as follows:

> "The challenged delegates claim that the Democratic National Party cannot abridge their right under Illinois law to the delegate seats for which they have been elected. *The relationship, in this case, between the Illinois law and the Party's regulations offers no grounds for relief to the challenged delegation.* No violation of Illinois law is at issue here. The Illinois election law is, by itself not incompatible with guideline C-6 of the McGovern Commission. The guideline complements the Illinois law in an area—selection of delegate slates—where the state law is silent. *The right of a national political party to determine*

> *the qualifications of delegates to its conventions, if exercised within the confines of the Constitution, cannot be defeated merely because an individual delegate has not violated a state law in addition to a valid party regulation.* To hold otherwise would severely limit the freedom of association of the party itself." (A.-54.) (Emphasis added.)

The Court of Appeals stated "we have acknowledged the National Party's right to impose requirements on the delegate selection process separate from and in addition to those imposed by State law." (A.-57.)

Respondents' Petition For a Writ of Certiorari to this Court, filed July 6, 1972, contains an extensive description of the Illinois Election Code (at pp. 2-5) and argues that "where the right to political party office is regulated by a fair and non-discriminatory state statute, internal decisions or rules of party officials cannot divest a person duly selected in accordance with law of the right to hold such office." (at p. 18 *et seq.*) This is precisely the same argument subsequently made by respondents in, and adopted by, the Illinois court. (A-144.) See also respondents' complaint to the same effect in the District of Columbia Federal court action quoted at p. 9, *supra.*

There is no basis for the contention that the issue involved in this case had not been litigated by respondents (unsuccessfully) in their Federal court action. The most that can be said is that the Illinois courts disagreed with the result of respondents' Federal court action in regard to the relationship between state law and the National Party Rules. But mere disagreement with the prior decision and judgment of a Federal court offers no basis whatsoever for the state court's refusal to respect that prior judgment. Indeed, even if it were assumed that the Federal

court was *incorrect* in its analysis of the role of state law in determining the qualifications of National Convention delegates, the judgment of that court was not subject to collateral attack in the Illinois state courts. *E.g., Stoll* v. *Gottlieb, supra,* at 170-172; *Deposit Bank* v. *Frankfort, supra.* Cf. *Sutton* v. *Lieb,* 342 U.S. 402, 408 (1952).

The July 7 Decision of this Court and the July 5 Decision of the Court of Appeals Were Presented and Argued to the Trial Court Judge. Finally, the Illinois Appellate Court stated that petitioners had failed "to preserve their argument, based on the res judicata effect of the decision of the U.S. Court of Appeals for the District of Columbia in the record." (A.-134.) In fact, however, the record clearly shows that the July 5 decision and judgment of the Court of Appeals, as well as the July 7 decision of this Court, were both presented to the trial court judge on July 8, 1972, during the course of the emergency hearing on respondents' motion for a temporary injunction and petitioners' motion to dismiss the complaint. Both opinions appear as exhibits in the record of the trial court proceedings. (Report of Proceedings of July 8, 1972 at pp. 29-30 and related exhibits.)

As this Court has held, a federal question—in the present case, the effect of a Federal court judgment in subsequent state court proceedings—must be raised in a timely manner in the state courts, but

> "[n]o particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented." *New York ex rel. Bryant* v. *Zimmerman,* 278 U.S. 63, 67 (1928).

See, *e.g., Brown* v. *Western Ry. of Alabama,* 338 U.S. 294, 298-99 (1949).

In the circumstances of the instant case, it is clear that the issue of the conclusive effect of the Court of Appeals' prior judgment was brought to the attention of, and its effect was argued to, the trial judge, who, after considering the decision and judgment of the Court of Appeals and the July 7 decision of this Court, rejected petitioners' *res judicata* claim on the merits.

In summary, respondents, having chosen in the first instance to seek to reverse the Democratic Credentials Committee's decision on the Chicago contest in the Washington, D. C. Federal courts, and having lost in the District Court, the Court of Appeals, and finally, at a Special Term, in the Supreme Court of the United States, were not entitled to proceed to relitigate the issues in the case in the Cook County trial court in an effort to obtain a different result. See, *e.g., Blonder-Tongue* v. *University Foundation,* 402 U.S. 313, 320-330 (1971); *Stoll* v. *Gottlieb,* 205 U.S. 165, 170-172 (1938). To permit respondents to relitigate the issues merely because they were dissatisfied with the result reached by the Federal courts would be to sanction a wholesale, entirely unjustifiable, departure from the salutary principles of *res judicata.* As Professor Vestal has stated:

> "Where a party has picked his court, and his defendants and the issue to be tried, and has then lost in the litigation, it would seem to be entirely reasonable to say that he is precluded from litigating a second time the issues decided. Is it not entirely fair to implement the general policy of preclusion by holding that such a party is bound by the determination made in the first suit? The plaintiff in Suit I has had his day in court under conditions entirely of his choosing. To allow this party to relitigate the issues so adjudicated would seem to be entirely inconsistent with the generally accepted rationale of preclusion." A. Vestal, *Res Judicata/Preclusion* 314 (1969).*

Nothing in the *per curiam* opinion of this Court of July 7, 1972 staying, but not vacating, reversing or modifying, the judgment of the Court of Appeals suggested any intention to permit relitigation of the issues in an Illinois state court. To the contrary, this Court's opinion expressly stated that its action was intended to permit the Democratic National Convention to exercise its historical right to resolve controversies over the seating of National Convention delegates. It was during the period that the stayed judgment of the Court of Appeals was outstanding and unvacated that the Circuit Court of Cook County entered its orders purporting to bar conduct which the Court of Appeals had expressly authorized. The actions of the 1972 Democratic National Convention and petitioners during

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* A more recent analysis by Professor Vestal has particular pertinence to the actions of respondents in attempting to circumvent the judgment of the Federal courts by resorting to the state courts:

> "[T]he courts in some cases found that the two suits were related in some tactical sense, that is, that someone had deliberately arranged for the litigation to occur serially as it did to achieve a certain tactical advantage. The courts seem to indicate an unwillingness to 'play games.' There is a reluctance to allow courts and lawyers to go beyond decision-making and engage in proceedings that are seen as repetitious and nothing more than a method by which lawyers are kept busy and courts are kept crowded, and which serve no socially desirable end. In fact, the repetitive proceedings are seen as socially destructive—something which should not be allowed. Finally, some courts seemingly find the possibility of inconsistent judgments very undesirable. The symmetry of the law—which has been for a long time one of the bases of preclusion—is listed as an end to be sought." Vestal, "Res Judicata/Preclusion," 47 So. Cal. L. Rev. 357, 374 (1974). (Footnotes omitted.)

this period were taken under the explicit protection of the judgment of the Court of Appeals, as well as the July 7 decision of this Court.

II.

A STATE CANNOT CONSTITUTIONALLY DEPRIVE A NATIONAL POLITICAL PARTY, AND CITIZENS SEEKING TO ASSOCIATE AS MEMBERS OF SUCH NATIONAL PARTY, OF THE RIGHT TO DETERMINE THE COMPOSITION OF A NATIONAL POLITICAL PARTY CONVENTION IN ACCORDANCE WITH NATIONAL PARTY RULES, STANDARDS AND PRINCIPLES.

This case presents the unprecedented situation in which a single State asserts that it has power to interfere in a fundamental way with the freedom of citizens to engage in National Political Party activities. The Illinois Appellate Court held that the 1972 Democratic National Convention was "without power or authority" to decide which of the two contesting delegations should be seated to represent the Chicago districts in the National Convention. (A.-149.) According to the Illinois Court:

> "The right to sit as a delegate representing Illinois at the national nominating convention is governed exclusively by the Illinois Election Code." (A.-139.)

The Illinois court held that "the law of the state is supreme and party rules to the contrary are of no effect" (A.-143.) and that:

> "Once elected, any question of the delegates' [respondents'] qualifications to hold office is beyond the authority of party functionaries; it is a legal right properly protected by the courts." (A.-144.)

The Illinois Appellate Court therefore held that the Circuit Court of Cook County had the power to issue injunctions against petitioners' participation in the 1972 Democratic National Convention and in Democratic National Committee affairs—notwithstanding the decisions of the Democratic Party's Credentials Committee and of the delegates to the 1972 Democratic National Convention itself that petitioners, and not respondents, should be seated.

The holding of the Illinois court is without precedent. It represents a drastic interference with the rights of citizens to engage in National Political Party affairs as those rights have been understood and exercised since the founding of our National Political Parties. If the Illinois court is correct that the right to sit as a delegate to a National Political Party Convention is "governed exclusively" by Illinois law, then the National Political Party is effectively denied the right to establish and enforce national rules, standards and principles of its own.

Further, if the courts of the State of Illinois can enforce such a doctrine, then so can the courts of the other 49 States. Thus, to take another example from the 1972 Democratic National Convention, the State of California could have barred the seating of the challenging delegation (not chosen in accordance with California law) in the California contest. Similarly, in the case of virtually every other contest in which the National Conventions of both political parties have historically exercised—or may seek in the future to exercise—their right to decide controversies over the seating of delegates, a state court could, under the holding of the Illinois Appellate Court, dictate the result by enjoining the participation of the contesting delegation.

The composition of a National Party Convention—in substance the definition of the National Party and what it stands for—would no longer be determined by the National Party itself, but rather by the state courts. The manner in which the state courts would actually exercise this power could vary from State to State. Thus, for example, requirements of National Party loyalty might be enforceable as to delegates from New Hampshire but not those from Nevada, National Party rules barring closed slatemaking by local parties might be valid in Ohio but not in Illinois, National Party principles of non-discrimination might apply in Texas but not in Mississippi.

Such a holding conflicts with the most fundamental political rights of our National Political Parties to define themselves and to exist and function as national political organizations. It conflicts with the fundamental rights of citizens to associate freely together in National Political Party activities.

A. For almost a century and a half the National Political Parties themselves have decided contests over the seating of delegates to their National Conventions, rejecting the proposition that they are bound to seat delegates selected in accordance with state law.

As emphasized in this Court's *per curiam* opinion when this controversy first came before the Court:

> "It has been understood since our national political parties first came into being as voluntary associations of individuals that the convention itself is the proper forum for determining intra-party disputes as to which delegates shall be seated." 409 U.S. at 4.

Even the most cursory reading of the proceedings of our National Political Party Conventions demonstrates that, for almost a century and a half, the exercise of the power to determine their own composition has been a central feature of their activities as National Political Party organizations.

The supreme governing body of a National Political Party is its National Convention which assembles every four years pursuant to an official Call issued by the Party's National Committee. The Call specifies the number and allocation of Convention delegates and the basic rules and principles to govern their selection and qualifications. Both National Parties currently permit a variety of delegate selection methods to be utilized (direct election, caucus, convention, committee and appointment) subject to the basic standards set forth in the Call. See generally *Nomination and Election of the President and Vice President of the United States, Including the Manner of Selecting Delegates to National Political Conventions* (R. Hupman & R. Thornton, ed. January, 1972); *Choosing the President* (League of Women Voters of the United States, 1968). The Convention has the ultimate power to select the party's nominees for President and Vice-President of the United States. "The delegates, or a majortiy of them, can declare the party's official position on issues affecting public policy and make rules governing all aspects of the party's national organization and operations." Goodman, *The Two-Party System in the United States* 181 (1964).

Political scientists emphasize that "The Conventions do something that no other organ of the American system does: . . . they supply, however imperfectly, one great need of the American system, the nationalizing

of party politics." D. Brogan, *Politics in America* 234 (1954). See *Choosing the President* 19 (League of Women Voters of the United States, 1968) ("The national convention is the national party. It is at the heart of the national party system.") The various state political parties are "affiliated with a national party through acceptance of the national call to send delegates to the national convention." *Ray* v. *Blair,* 343 U.S. 214, 225 (1952).

Among the very first actions taken at the first National Democratic Convention in 1832 and at the first National Republican Convention in 1856 was the appointment of a Credentials Committee to determine and resolve contests over the composition of the Convention. * Since that time, at virtually every National Convention of both Political Parties, contests over the seating of delegates have been heard and decided by the National Committees (in determining the temporary roll of delegates) in some cases, by the Credentials Committees or—as in the case of the 1972 Chicago contest—on the floor of the Convention itself.

In the Republican Party there have been credentials disputes at the National Conventions in 1860, 1864, 1868, 1872, 1876, 1880, 1884, 1888, 1892, 1896, 1900, 1904, 1912, 1916, 1920, 1924, 1928, 1936, 1948, 1952 and 1956. In the Democratic Party there have been credentials disputes at the Conventions in 1832, 1836, 1848, 1852, 1856, 1860,

* Official Proceedings of the 1856 Republican National Convention at p. 21; R. Bain, *Convention Decisions and Voting Records* (Brookings, 1960) at 17. The official proceedings of both parties' National Conventions are hereinafter referred to as "Democratic Proceedings" and "Republican Proceedings".

1864, 1880, 1884, 1888, 1892, 1896, 1900, 1904, 1908, 1912, 1920, 1928, 1932, 1936, 1944, 1948, 1952, 1956, 1964, 1968 and 1972. See generally R. Bain, *supra.*

In resolving such contests the National Parties have looked to their own procedural rules, National Party policies and principles and a variety of political interests directed toward strengthening the National Party and advancing the ideas and interests to which it is committed.* Both Parties have rejected the proposition that they are bound to seat delegates chosen in accordance with a state law. See generally pp. 54-67, *infra.*

Even apart from its significance in demonstrating the importance of credentials contests as a feature of the free political activity of our National Political Parties, this history has independent significance in the interpretation of the Constitution as it applies to National Political Parties. In *Walz* v. *Tax Commission,* 397 U.S. 664 (1970), this Court noted the relevance of longstanding historical practice in considering the validity under the First Amendment of property tax exemptions for religious organizations. 397 U.S. at 678. Mr. Justice Brennan, concurring, articulated the relevance of the history of the exemption:

> "The existence from the beginning of the Nation's life of a practice, such as tax exemption for religious organizations, is not conclusive of its constitutionality. But such practice is a fact of considerable import in

* See, *e.g.,* Brief of John Minor Wisdom, et al. on Behalf of Louisiana Delegates Representing New Republican Leadership in Louisiana, submitted to the 1952 Republican National Convention:

> "The importance of the Louisiana contest lies in its effect on the development of a decent, active Republican party leading to a two-party system in the South." (at p. 6)

the interpretation of abstract constitutional language. On its face, the Establishment Clause is reasonably susceptible of different interpretations regarding the exemptions. This Court's interpretation of the Clause accordingly, is appropriately influenced by the reading it has received in the practices of the Nation. As Mr. Justice Holmes observed in an analogous context, in resolving such questions of interpretation 'a page of history is worth a volume of logic.' *New York Trust Co.* v. *Eisner,* 256 U.S. 345, 349 (1921). The more longstanding and widely accepted a practice the greater its impact upon constitutional interpretation." 397 U.S. at 681. *

1. The Republican Party Experience

In credentials contests as early as 1880—even before the adoption of state primary laws—the Republican National Convention, in debating whether to enforce in all States a principle of Congressional district delegate election (as opposed to statewide election), was faced with the argument that "this is a matter entirely in the discretion of the Republicans of the several States." (Minority Report of the Credentials Committee, 1880 Republican Proceedings at p. 53.) Further it was argued:

> "The proposition now is for the National Convention here assembled to deny the right of the State convention of the State of Illinois [one of the states involved

* See also *Ray* v. *Blair,* 343 U.S. 214 (1952) (discussed more fully at pp. 71-72, *infra*), involving the constitutionality of a Democratic Party requirement that candidates for presidential elector pledge to support the nominees of the Democratic National Convention, where the Court noted that the "long-continued practical interpretation of the constitutional propriety of an implied or oral pledge . . . weighs heavily when considering the constitutionality of a pledge." 343 U.S. at 229-230.

> in the contests], acting as a convention, to determine the methods by which the delegates to a National Convention be elected . . . . The various States in the Union will not tolerate it and will not accept the doctrine that the National Convention, made up of all the States, shall dictate the methods of proceeding to the convention of any State." *Id.* at pp. 60-61.

The Republican National Convention, however, rejected the State supremacy argument and made its decision on various contests on the basis of "the adoption in the National Convention of the principle of Congressional district representation" (Majority Report of the Credentials Committee, 1880 Republican Proceedings at p. 49). The majortiy defended its decision on the ground that this method of selection best served "the purpose to be secured in nominating a President [which] is the selection of a candidate the most likely to be accepted by the people." *Id.* at p. 50.

Following those contests, the 1880 Republican National Convention directed the Republican National Committee to set forth in the Call for the 1884 National Convention the methods to be used for the selection of delegates to the future Conventions. 1880 Republican Proceedings at p. 160. The Republican National Committee added language to the Call to the 1884 Convention requiring that a portion of the delegates be selected in Congressional District elections or conventions and that at-large delegates be selected by a statewide process. 1884 Republican Proceedings at p. 4.

In 1888 the Republican National Convention enforced these Call provisions in deciding contests from Virginia. The challengers contended that various district conventions held under the auspices of the official Virginia State

Party Committee violated the Call in that they were held outside the Congressional district involved. The supporters of the "official" delegates argued that they had been chosen at district conventions called by the State Committee and that "the organic law upon which the Republican party operates in the State of Virginia vests all and every power in the State Committee." (Remarks of Delegate Bingham, 1888 Republican Proceedings at p. 75.) Further it was argued as to the challengers that "their conventions were unlawfully called and held [and] their title is inherently and fundamentally defective, and they have no more right to seats on this floor than any other body of unauthorized strangers." Minority Report of the Credentials Committee, *Id.* at p. 66. Nevertheless, the Convention rejected the "official" delegates and seated the challengers. According to the majority supporters:

> "It is a question of the call of the National Executive Committee, and it must be met; it must be responded to, whatever may be the consequences, by the election of delegates in the manner the call requires." (Remarks of Delegate Moore, *id.* at p. 79)

In 1896, the Republican National Convention faced a large number of credentials contests. In the Delaware contest it was conceded that the "regular" delegation, headed by J. Edward Addicks, had been elected by the members of the state convention who had in turn been chosen in primary elections. The majority of the Credentials Committee and the Convention, however, seated the challengers on the ground that Addicks was a disloyal Republican (because he had been involved in efforts to defeat a Republican Senator) and further his majority "was secured by the use of money, by bribery and purchase of voters at the primary." (Remarks of Delegate Yerkes, 1896 Republican Proceedings at p. 54) The minority argued that "there was no proof of any character considered by your Committee" and that to seat the challengers was to deny "the principle of the right of free representation." (Remarks of Delegate Hepburn, *id.* at pp. 55, 57). However, the principal spokesman for the majority stated:

> 'I claim that this Convention is by the rules of its own organization, and is by necessity, not only judge of the election of its members, but is judge of them and of the propriety of their admission to a seat." (Remarks of Delegate Yerkes, *id.* at p. 54)

In 1912 the Republican Party was faced with numerous credentials contests between the Taft and Roosevelt forces. Roosevelt forces challenged the credentials of 252 Taft delegates and three days of the Convention were occupied solely in determining the initial roll of delegates. California had adopted a statewide winner-take-all primary law. The Republican National Convention, however, refused to seat all California delegates elected in accordance with state law on the ground that the primary violated the principle of Congressional district representation set forth in the Convention Call. Instead the Convention seated a contesting delegation chosen at the Congressional district level. 1912 Republican Proceedings at pp. 202-12. The Credentials Committee report stated that "a state law could not supersede the Call of the National Committee as directed by the Republican National Convention, the supreme organ of party regularity." *Id.* at p. 219. The 1912 Republican Convention also refused to seat delegates selected in accordance with Texas law. *Id.* at pp. 109, 286.

At the 1928 Republican National Convention the posture of the Republican Party in relation to state delegate selec-

tion laws was reemphasized in a contest over the seating of the Texas delegation. It had apparently been suggested that the Convention was bound to seat the "regular" Texas delegation because its members were chosen in accordance with Texas state law, to which Judge Daniel O. Hastings of Delaware replied:

> "I submit to you that this is a principle that has been followed by the Republican Party since its existence, and not until now, as far as I know, as far as anybody has suggested, not until now has it been questioned; not until now have we had brought to our attention the question as to whether or not a legislature in Texas, a Democratic legislature in Texas, shall pass a law which shall be binding upon the great Republican National Convention.
>
> "I contend that the Republican National Convention is an organization of its own and makes its own laws. And the state of Texas has nothing to do with it." (Remarks of Delegate Hastings, 1928 Republican Proceedings at p. 54)*

At the 1952 Republican National Convention the issue came up again particularly in relation to the Georgia challenge which was critically involved in the Taft/Eisenhower contest for the presidential nomination. See generally G. Mayer, *The Republican Party 1854-1966* 488-90 (1967). The faction constituting the Taft delegation had obtained a Georgia state court judgment affirming that it was the lawful Republican Party in Georgia. Indeed the proponents of the Taft delegation stated that:

> "In several separate actions the courts of the state of Georgia have declared that the Foster organization [the Taft delegation] is the legal Republican group in the state of Georgia." (Remarks of Delegate Thomson, 1952 Republican Proceedings at p. 173)

* The Chairman of the Credentials Committee immediately agreed with Judge Hastings that "the Republican National Convention makes its own laws." *Id.* at p. 59.

A proponent of the Taft delegation appearing before the National Convention stated:

> "I hold in my hand here a certified copy of the judgment of Judge Byars [the Georgia trial court judge], dated the 30th day of June, 1952 [7 days prior to the Convention]." (*Id.* at p. 174)

He noted that "Judge Byars had refused to grant a supersedeas and his judgment still remains unchanged in the court of the State of Georgia" and the judgment (which "ordered, considered and adjudged that the plaintiffs, the Foster delegation, are declared to be the legal Republican Party in Georgia") was read aloud. *Id.* at pp. 173-74.

The 1952 Republican National Convention nevertheless rejected the Taft Georgia delegation. In the course of the debate, Delegate Gordon X. Richmond of California stated:

> "I believe that this National Convention is absolutely the last authority, the supreme court in deciding who shall have credentials to this Convention, and it shall not be dictated to by the State Court of Georgia or by any other court." *Id.* at p. 168.

Governor Alfred E. Driscoll of New Jersey stated:

> "This Convention is the sole judge of the qualifications of its own members. That is the first point. Two, the decision of a lower court in Georgia is not binding upon Republican tribunals nor can its decision be dispositive of the issues before this great Convention.

"And, three, if we adopt the Majority Report we would be establishing a dangerous precedent.

• • •

"I have spent the best years of my life strengthening the judicial system in my State. I have a healthy respect for the American judicial system. I have also a healthy respect for the judicial system of Georgia. But I submit to you that this is the supreme court of Republicanism and is the proper tribunal before which the issues raised by the contest must be settled. (Applause)

"Secondly, we have no right to allow our jurisdiction to be limited, for to do so would be to tie our hands and perhaps permit all kinds of judicial decisions to prevent us carrying on our business.

"We and we alone are the sole judges of the qualifications of our members. It is a responsibility that we can not delegate.

"While we all can respect the courts, we must all abide by our own responsibilities." *Id.* at p. 169.

It was also noted in the course of the debate at the 1952 Convention that a judge in Mississippi had issued a judgment regarding which contesting Mississippi delegation was recognized under Mississippi law, but the Credentials Committee and the Convention seated the challengers. *Id.* at p. 170.

It should be emphasized that neither in Georgia or Mississippi in 1952—nor, to petitioners' knowledge, in any other case in the history of our National Party Conventions—did a state court judge do what Judge Covelli, the Cook County Circuit Court judge, did in the 1972 Chicago case on the eve of the National Convention—that is, purport to *enjoin* a contesting delegation from participating in a National Party Convention.

2. The Democratic Party Experience

The Democratic Party, like the Republicans, has faced and resolved credentials contests over a wide variety of issues at its National Conventions since its first convention in 1832. See generally R. Bain, *supra*. At the early Conventions various procedural issues had to be resolved for the first time.* Often the contests involved competing factions within the state parties—for example, a long series of contests involved Tammany and anti-Tammany forces in New York—and frequently were resolved by splitting the votes between the contesting delegations.**

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* For example, in 1836 there were two contesting Pennsylvania delegations and ultimately the Convention decided to seat both groups in a compromise which, according to the Convention reporter, "satisfied neither party." (R. Bain, *supra*, at p. 21). Prior to the vote, however, the question arose for the first time of whether contested delegates should be allowed to vote in the Convention prior to resolution of the contest. That same issue was a central focus of debate at the 1912 Republican National Convention, the 1952 Republican National Convention and (insofar as it involved the California delegates) the 1972 Democratic National Convention. Under the Democratic Party Rules in effect in 1972, petitioners were placed on the temporary roll of delegates by the Democratic National Committee but were not allowed to vote on the Chicago contest.

** In 1884 two factions—the "Hunkers" and the "Barnburners"—presented contesting delegations from New York and an entire evening and all of the next day were devoted to debate, finally resolved by splitting the vote between the two delegations. (R. Bain, *supra*, at pp. 36-38). The idea of splitting the vote between two contesting delegations was one adopted in the case of a large number of contests at future conventions—*e.g.*, Georgia in 1852, New York in 1856, Massachusetts in 1880—down to more recent decisions such as the 1968 decision to split the Georgia vote between the Lester Maddox and Julian Bond delegations (see pp. 65-66, *infra*).

Often the resolution of contests has had important political consequences. In 1896, for example, a "Silverite" majority in the National Convention reversed a decision by the Democratic National Committee (which was controlled by "Gold" forces) on several contests and, among other things, seated a "Silverite" delegation from Nebraska headed by William Jennings Bryan. R. Bain *supra* at p. 155. Bryan subsequently delivered the famous "Cross of Gold" speech and he ultimately became the Party's presidential nominee.

In 1908 the Democratic National Convention rejected the delegates chosen in a primary held under Pennsylvania law on the ground that the primary had been distorted by the votes of Republican "raiders." 1908 Democratic Proceedings at pp. 101-103. The minority argued unsuccessfully that this action was contrary to the "certified returns of this election" and that the challengers, who consisted primarily of losing candidates in the election, "had no credentials." (Remarks of Delegate Strauss, *id.* at p. 104).

In 1912 a South Dakota contest involved a primary in which a "Wilson-Bryan" slate had received a plurality and were the winners under state law. However, the State Democratic Party, contrary to the state election authorities, had certified to the National Convention an alternative slate pledged to Champ Clark on the ground that that slate, together with a slate pledged to "Wilson-Bryan-Clark," had received a majority of the primary votes. After extensive debate, the Convention ultimately held for the Wilson-Bryan slate by a vote of 639½ to 437. R. Bain, *supra* at 187.

In 1928 the Democratic National Convention saw the first of several Louisiana contests. The Louisiana state executive committee, dominated by Huey Long, had chosen

the delegates who were seated by the Credentials Committee. A minority report stated the argument, unsuccessfully, that always before Louisiana had had a convention to choose its delegation, and that the state executive committee's actions had been "contrary to law, precedent and without authority." 1928 Democratic Proceedings at p. 38. In 1932 the Long-dominated state committee again chose a delegation. This time a minority report was presented on behalf of a contesting delegation headed by Frank J. Looney, which included ex-governors and other prominent Louisiana citizens, "all of whom were trying to break the hold of the Long machine in Louisiana." R. Bain, *supra,* at p. 237. Governor Huey Long argued his own case before the Convention, stating at the outset that, if he was defeated, the Democratic electors would be taken off the ballot in Louisiana. (Remarks of Delegate Long, 1932 Democratic Proceedings at p. 61) He also accused the challengers of deliberately holding their own convention only a few days prior to the National Convention and he claimed:

> "They knew that if they had held this convention in time for us to have gone to court we would have gone to court and got out an injunction against them to keep them from coming here with that kind of fiasco. No; they called that rump convention in Shreveport just before they were to meet in Chicago so that they could get out of the state before we could slap on an injunction and stop them from coming up here." *Id.* at p. 64.*

Long was ultimately successful but only by a narrow margin of 638¾ to 514¼. *Id.* at pp. 67-68. See generally R. Oulahan, *The Man Who . . . The Story of the Democratic National Convention of 1932* (1971).

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* This appears to be the only instance prior to 1972 in which such an injunction was even threatened against a contesting delegation.

In 1944 the Democratic National Convention faced a Texas contest which was the first of a series of contests involving the "loyalty" of Southern delegations. A. Holtzman, *The Loyalty Pledge Controversy in the Democratic Party* 1-4 (Eagleton Institute Cases in Practical Politics, Case No. 21, 1968). The Texas "regulars" argued that they alone had been properly elected at the State Democratic Convention and that under Texas law the Supreme Court of Texas had held that the "regular" convention was lawful. (Remarks of Delegate Willis, 1944 Democratic Proceedings at p. 86) But the challengers, who had held a "rump" convention, charged that the regular convention had not named Democratic electors who were pledged to support the nominee of the Democratic National Convention. (Remarks of Delegate Jones, *id.* at p. 87-89). The Credentials Committee split the Texas votes between the two delegations, and that decision was upheld on the floor of the Convention. *Id.* at p. 91.

In 1948 the Democratic National Convention faced a similar "loyalty" contest over the seating of the delegates chosen under Mississippi law who had publicly threatened to withdraw from the National Convention if it failed to repudiate President Truman's civil rights policy. A minority report opposing the seating of the "regular" Mississippi delegation was presented, but was defeated. 1948 Democratic Proceedings at p. 104.

A large number of southern Democrats did refuse to support the Democratic ticket in 1948 and supported a third party ticket headed by Governor J. Strom Thurmond of South Carolina. In some cases they succeeded in placing Thurmond electors on the state ballots under the name of the Democratic Party. As a result there was strong concern in 1952 to assure the party loyalty of all delegates. The National Convention adopted a resolution

refusing to seat any delegates—however selected—unless they took a "loyalty oath." 1952 Democratic Proceedings at pp. 55, 73.

After the 1952 Democratic National Convention the Democratic National Committee appointed a special committee to deal with the "loyalty" issue. This committee produced a new "loyalty" rule which was incorporated into the Call of the 1956 Democratic National Convention. In 1964 the Democratic National Convention determined that the Alabama state party had violated this rule and the Convention refused to seat the delegates elected under Alabama law unless they took a "loyalty oath." 1964 Democratic Proceedings at pp. 4-5. Almost none of the Alabama delegates were willing to take such an oath and they were not seated. *Ibid.* Again in 1968, the Democratic Convention determined that the Alabama party had violated this rule and this time it not only refused to seat the elected Alabama delegates who refused to take an oath but it seated in their place members of a contesting delegation. 1968 Democratic Proceedings at p. 206.

In 1964 the Mississippi Freedom Democratic Party mounted a challenge to the "regular" Mississippi delegation on the ground of disloyalty to the National Party and racial discrimination in Mississippi state Democratic Party affairs. That Convention refused to seat the challengers. However, in a compromise, it was agreed that delegations to all future National Conventions should be subject to a requirement of full racial equality in all state party affairs. 1964 Democratic Proceedings at pp. 30-31.

In 1968 the Democratic National Convention decided that the Mississippi Democratic Party had not lived up to the non-discriminatory standard set forth in the Call and it refused to seat the entire "regular" delegation, chosen under Mississippi law, and seated a contesting

delegation. 1968 Democratic Proceedings at p. 248. In part on the same grounds, that Convention also deprived the delegation chosen in accordance with Georgia law of one-half of their votes and gave them to a contesting delegation. A challenge to the delegation chosen in accordance with Texas law was defeated on the floor of the 1968 Democratic National Convention. Fifteen other contests were heard by the Credentials Committee. See generally Schmidt and Whalen, "Credentials Contests at the 1968—and 1972—Democratic National Conventions," 82 Harv. L. Rev. 1438, 1446-1465 (1969).

The 1968 Democratic Convention directed that a Commission be established to study delegate selection procedures and adopt new rules governing delegate selection. That Commission held a series of hearings and in April, 1970, the Commission reported to the Democratic National Committee proposing new rules to be incorporated into the Call of the 1972 Democratic National Convention. See Commission on Party Structure and Delegate Selection to the Democratic National Committee, *Mandate for Reform* (April, 1970). The new rules were proposed because of the conclusion that there were "profound flaws in the presidential nominating process; . . ." (*id.* at 9) and that present processes were "inadequate for assuring the opportunity for widespread participation." *Id.* at 8. Further, new rules were deemed necessary to insure a "strong, winning and united Party." *Id.* at 51.

The Democratic National Committee issued the Official Call of the 1972 Democratic National Convention incorporating the new rules. Pursuant to that Call the delegates to the 1972 Democratic National Convention assembled in Miami, Florida on July 10, 1972. In addition to the Chicago contest, a total of 81 contests involving 1230 delegates from 32 states and territories were filed with the 1972 Credentials Committee. Many of the contests were

compromised or dismissed prior to the 1972 Convention. In various cases (in addition to Chicago) delegations chosen under state law were altered or modified. See Report of the Credentials Committee to the 1972 Democratic National Convention 85 (July 8, 1972). The rules set forth in the Call were the basis for petitioners' challenge against respondents.

B. The holding of the Illinois Appellate Court would deprive citizens associating together in a National Political Party of the constitutional right, inherent in the fundamental nature and necessary to the functioning of National Party organizations, to determine the composition of their National Party Conventions in accordance with National Party rules, standards and principles.

The holding of the Illinois Appellate court in this case would bring the resolution of credentials contests and the determination of the composition of National Party Conventions by the National Political Parties themselves—which, as discussed above, has been the practice for almost 150 years—to an end. If state law exclusively governs the qualifications of National Convention delegates, as the Illinois court held, then the right of the National Party to determine the composition of its National Convention in accordance with its own rules and principles is abrogated. Only persons approved by a state court could be seated in the National Party Convention, regardless of whether (as the National Democratic Party found in the case of respondents) those persons have deliberately and grossly violated basic National Party rules and principles. Petitioners submit that such a holding is in direct conflict with the constitutional right of American citizens to associate together in a National Political Party on the basis of national rules, standards and principles.

This Court has repeatedly held that the freedom to participate in political party activity is protected by the First and Fourteenth Amendments. In *Kusper* v. *Pontikes*, 414 U.S. 51 (1973), this Court recently said:

> "There can no longer be any doubt that freedom to associate with others for the common advancement of political beliefs and ideas is a form of 'orderly group activity' protected by the First and Fourteenth Amendments. . . . The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom." 414 U.S. at 58-59.

In that case this Court held that a provision of Illinois law barring voting in a particular primary election by persons who had voted in the primary of another political party within the preceding 23 months "conspicuously infringes upon basic constitutional liberty" depriving citizens of the "constitutional freedom to associate with the political party of their choice." 414 U.S. at 60-61. The present case involves injunctive orders that even more "conspicuously infringe upon basic constitutional liberty" by depriving Illinois citizens—and citizens from throughout the nation—of the right to associate together in accordance with National Party rules and principles.

In *Williams* v. *Rhodes*, 393 U.S. 23 (1968), Mr. Justice Black, writing for the Court, said:

> "We have repeatedly held that the freedom of association is protected by the First Amendment. And of course this freedom is protected against federal encroachment by the First Amendment and is entitled under the Fourteenth Amendment to the same protection from infringement by the states." 393 U.S. at 30-31.

In that case this Court held that the State of Ohio could not condition access to its general election ballot upon a political party meeting a series of stringent conditions,

requiring extensive organization and other election activities at an early date. In the present case the State of Illinois asserts a right, not to condition access to its ballot upon political parties meeting certain approved conditions, but rather a right to *enjoin* activities of individual citizens and a National Political Party of which it disapproves—specifically the enforcement of any National Party rules or principles in relation to the Illinois delegates to a National Convention.

In *DeJonge* v. *Oregon*, 299 U.S. 353 (1936), this Court reversed a criminal conviction of persons who had attended a meeting of the Communist Party. Chief Justice Hughes, writing for the Court, stated:

> "Freedom of speech and of the press are fundamental rights which are safeguarded by the due process clause of the Fourteenth Amendment of the Federal Constitution. [citations omitted] The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental. As this Court said in *United States* v. *Cruikshank*, 92 U.S. 542, 552: 'The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for redress of grievances.' " 299 U.S. at 364.

In *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449 (1957), Mr. Justice Harlan wrote for a unanimous court:

> "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect to the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." 357 U.S. at 460.

Similarly, in *NAACP* v. *Button*, 371 U.S. 415 (1962), Mr. Justice Brennan stated:

> "Our form of government is built on the premise that every citizen shall have the right to engage in political expression and association. This right was

> enshrined in the First Amendment of the Bill of Rights. Exercise of these basic freedoms in America has traditionally been through the media of political associations. Any interference with the freedom of a party is simultaneously an interference with the freedom of its adherents." 371 U.S. at 415 (quoting *Sweezy* v. *New Hampshire*, 354 U.S. 234, 250-51 (1957)

See also *Bates* v. *Little Rock*, 361 U.S. 516, 522-23 (1960).

The freedom to engage in National Political Party activity is inherently a freedom which cannot be restricted by state lines. A National Party is the vehicle through which citizens throughout the nation, in various States, associate with one another for the advancement of common political objectives—particularly the selection of a nominee who can succeed in being elected President of the United States. What the Illinois Appellate court held, however, is that the State of Illinois can tell the citizens of the other 49 States, assembled in a National Party Convention, which persons from Illinois they could, or could not, associate with. Correspondingly, the Illinois court claims the right to enjoin its own citizens from associating with persons from other States in a National Political Party Convention—despite the decision of that Convention that it wished to have them participate.

It should be emphasized that the Illinois court does not merely assert the right of the State to conduct a process, utilizing the state election machinery, for the selection of National Convention delegates and to advise the National Party by initial certification, or by subsequent declaratory judgment, of the result. See *Riddell* v. *Nat'l Dem. Party*, 344 F. Supp. 908 (S.D. Miss. 1972) (appeal pending No. 72-2437, 5th Cir.) (in which the court issued a declaratory judgment that the so-called "Regulars" were chosen in accordance with Mississippi law, while the so-called "Loyalists" were not, but the court expressly refused to

enjoin participation of the "Loyalists" in the 1972 Democratic National Convention). Cf. *Roudebush* v. *Hartke*, 405 U.S. 15 (1972). The Illinois court claims power to *enjoin* participation in a National Party Convention of those persons whom the National Party has determined are its legitimate representatives from the State of Illinois. Such an injunction constitutes in substance a prior restraint upon the exercise of First Amendment freedoms, including the freedom of association, of a type repeatedly condemned by this Court. See, *e.g.*, *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415, 419 (1971).*

In *Ray* v. *Blair*, 343 U.S. 214 (1952), this Court upheld against constitutional attack the action of the Chairman of the Alabama Democratic State Committee in refusing to certify a candidate for presidential elector who refused to sign a pledge to support the nominee of the Democratic National Convention. This Court noted that "such a provision protects a party from intrusion by those with adverse political principles." 343 U.S. at 221-22. This Court further stated:

> "Neither the language of Art. II, § 1, nor that of the Twelfth Amendment forbids a party to require from candidates in its primary a pledge of political conformity with the aims of the party. Unless such a requirement is implicit, certainly neither provision of the Constitution requires a state political party, affiliated with a national party through acceptance of the national call to send state delegates to the national convention, to accept persons as candidates who refuse to agree to abide by the party's requirement." 343 U.S. at 225.

In rejecting the constitutional challenge to the practice of the Alabama party, this Court stated:

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* The same trial judge who issued the injunction reversed by this Court in *Organization for a Better Austin* v. *Keefe*, *supra*, issued the injunction against petitioners in the instant case.

> "A state's or a political party's exclusion of candidates from a party primary because they will not pledge to support the party's nominees is a method of securing party candidates in the general election, pledged to the philosophy and leadership of that party." 343 U.S. at 227.

It is the same fundamental interest of a political party in being able to establish its own "political principles" and serve the "aims of the party" which is threatened by the decision of the Illinois Appellate Court in this case.

Any of dozens of major credentials contests at National Party Conventions could be cited to illustrate the way in which the power to determine the composition of the National Convention has been central to the functioning of our National Political Parties—*e.g.*, the long series of contests in which the National Republican Party has established its basic alignments in the South, the Democratic "loyalty" contests of the 1940's and 1950's, the Democratic Party's decision in the 1960's to deny seating at future National Conventions to the representatives of state parties which have not assured full racial equality, and so forth. The activities involved in the 1972 Chicago case are a particularly dramatic instance of the exercise of these basic constitutional political rights.

The challenge by petitioners against respondents in 1972 produced a series of confrontations—before a hearing examiner appointed by the Democratic Party, then (after the examiner determined that respondents had engaged in "covert, calculated and deliberate violation" of the National Party Rules) before the Credentials Committee consisting of delegates from each State, and finally (after the Credentials Committee voted to seat petitioners) before the various state delegations and on the floor of the Democratic National Convention itself (see pp. 5-9, *supra*). After rejecting a last-minute motion to compromise the contest by seating both delegations, the delegates to the Democratic National Convention finally voted to

seat petitioners, and not respondents, as the Chicago delegates. In addition to reflecting the Convention's judgment as to who it regarded as the Party's legitimate representatives from Illinois, this decision had a significant impact on the national posture and policies of the Democratic Party and was, in part, determinative of who the Party's candidates would be in 1972. In its brief to this Court in *Keane* v. *National Democratic Party*, 409 U.S. 1 (1972), prior to the 1972 Convention, the National Democratic Party summarized the overall situation as follows:

> "After much internal discussion, the members of the party adopted a set of far ranging reforms designed to promote democratic participation at all levels of the process for selecting delegates to the Democratic National Convention, the highest organ of the party. And in this case they are seeking to enforce those reforms by refusing to seat at the convention delegates selected in violation of them. In taking this action the Credentials Committee of the National Convention has sought to vindicate the internal rules of the party so as to protect the right of all Democrats to participate in the party's decision-making processes and thereby make the party attractive to the public and the electorate. These are interests which the party has a First Amendment right to pursue." Memorandum for Respondents, National Democratic Party, at p. 11 (July 6, 1972).

Respondents were wholly free—and vigorously exercised the right—to debate the wisdom of the Democratic Party's decision on the Chicago contest. But petitioners submit that the right of the persons assembled in the Democratic National Convention to make that decision was—as in the case of other credentials contests at National Conventions in the past—at the very heart of the constitutionally protected freedom of petitioners and other citizens throughout the nation to associate together in a National Political Party and the right of that National Party to define itself and to exist and function as a National Political Party organization.

C. The holding of the Illinois Appellate Court is totally without judicial precedent.

No court, state or Federal, has ever before purported to enjoin persons from participating in a National Political Convention in accordance with the decision of that Convention that they should be seated.

When respondents instituted this action, petitioners filed a petition for removal of the action to Federal District Court for the Northern District of Illinois. As noted earlier, Judge Hubert L. Will determined that the action should be remanded to the state court because the Federal constitutional issues (*i.e.*, the First and Fourteenth Amendment rights of free political association of petitioners and the National Democratic Party) arose only in defense. *Cousins* v. *Wigoda,* 342 F. Supp. 82 (N.D. Ill. 1972). However, in remanding the case, Judge Will stated:

> "*This is not to suggest that the qualifications and eligibility of delegates to national political party conventions is properly determinable by state law or by state courts. If it were, each of the fifty states could establish the qualifications of its delegates to the various party conventions without regard to party policy, an obviously intolerable result.* The proper forum for determination of the eligibility of delegates to serve in such a convention is the Credentials Committee of the party or the convention." (Emphasis added.) (A.-12-13.)

Subsequently, in respondents' Federal court action, this Court stated that "no holding of this Court up to now gives support for judicial intervention in the circumstances presented here, involving as they do, relationships of great delicacy and essentially political in nature" (409 U.S. at 4.) This Court upheld the right of the 1972 Democratic National Convention, in the circumstances of the case, to seat the delegates elected under Illinois and California law, or the contesting delegations, or possibly some combination of the two. *Id.* at 3.

After the 1972 Democratic National Convention, the Court of Appeals for the District of Columbia stated on remand from this Court:

> "[T]he 1972 Convention of the National Democratic Party, acting within its competence, seated at the Convention the delegation [petitioners] whose right thereto was contested by plaintiffs Keane, et al. [respondents] . . ." (475 F.2d at 1288.)

In *Riddell* v. *National Democratic Party,* 344 F. Supp. 908 (S.D. Miss. 1972) (appeal pending No. 72-2437, 5th Cir.), a case arising immediately prior to the 1972 Democratic National Convention, the District Court determined that the "Regulars" had complied with the Mississippi statutes and that the "Loyalists" delegation, in contrast, was "not arrived at by any statutory process." 344 F. Supp. at 922. The court therefore issued a declaratory judgment "that the Regular faction is the legal, official Democratic Party of the State of Mississippi, and that the Loyalist faction is not." *Id.* The court declined to grant any further relief at that time, however, other than to find "that the Regulars are entitled to a hearing before the Credentials Committee and the full Convention if necessary, under any procedure or arbitration that will afford both factions an opportunity to be heard fully on the merits of their respective claims." *Id.* Subsequently, the Credentials Committee voted to seat the "Loyalists" instead of the "Regulars" as the Mississippi delegates. The "Regulars" then went back to the District Court asking for the kind of relief granted by the Illinois court in the instant case—namely an injunction against the participation of the "Loyalist" delegation in the National Convention. The court denied any such relief, acknowledging

the right of the National Convention to make its free political choice:

> "Part of the relief requested here is to enjoin the so-called 'Loyalists' from participating in the National Democratic Convention, but to do so would serve no plausible purpose. To do so would prohibit each and every democrat in Mississippi from having a voice in the selection of a candidate for President and Vice-President of the United States to run as a National Democrat.
>
> "To refrain from enjoining the Loyalists would at least grant each and every Democrat in Mississippi the privilege or right to speak through some group to the National Convention. The group selected might not voice the opinion of the majority of the electorate of Mississippi, but if not, that is the selection of the national organization, and the national organization takes its political risk—whether the potential stakes are good, bad—or just political." 344 F. Supp. at 923.

Petitioners do not suggest that the District Court in *Riddel* was correct in adjudicating in any manner the controversy which was before it. But it is notable that even that court, which was willing to rule upon certain aspects of a credentials controversy, clearly rejected the notion that it could, as the Illinois court purported to do, enjoin the participation in the National Convention of persons the Party's Credentials Committee and its Convention had voted to seat as delegates. This view is consistent with that of Judge Will who, in remanding the present case to the state court, noted that "it is difficult to imagine any thoughtful court granting the type of relief requested in the instant case." (A.-16.)

The Illinois Appellate Court cites various state court decisions which it claims are in support of its decision (A. 141-144.) But these authorities do not in fact support state court intervention into the process of a National Political Party convention. Indeed, there appear to be only two state court decisions which even *consider* the possibility

of such intervention and both expressly reject any such proposition.

In *State ex rel. Cook* v. *Houser*, 122 Wis. 534, 100 N.W. 965 (1904), which the Illinois Appeliate Court cites erroneously and at length (A.-142.) in *support* of its decision, a Wisconsin state court was asked to determine *after* the 1904 Republican National Convention whether the anti-LaFollette delegation (which had been seated at the National Convention) had the right to prevent state officials from placing on the ballot as Republicans candidates representing the LaFollette faction (who were recognized under state law but had been denied seats in the Republican National Convention). The Wisconsin court held that the anti-LaFollette faction had no such right under Wisconsin law. In coming to this conclusion the Wisconsin court expressly noted that:

> "whether the National Republican Convention decided right or wrong, for itself, in determining which of the sets of delegates applying for seats in such convention as regular Republican delegates from this state, were entitled to be recognized as such, *we have nothing whatsoever to do.*" 100 N.W. at 983. (Emphasis added.)

In 1936 an Alabama state court was asked to require the Alabama Democratic State Executive Committee to hold an election to choose National Convention delegates in accordance "with party custom and usage." The state court rejected the suit on the ground that no Alabama statute required an election and further stated:

> "The candidates in question are delegates to a national convention. No order or decree of this court could be enforced against that convention. *That body [the national convention], and not the courts, will be the final judge of who shall represent Alabama.*" *Smith* v. *McQueen*, 232 Ala. 90, 166 So. 788, 791 (1936). (Emphasis added.)

None of the other state court cases cited by the Illinois

Appellate Court even involves delegates to a National Political Party Convention.*

* Most of the other cases cited by the Illinois Appellate Court involve state regulation of *state* political party affairs, a wholly different question not involving the fundamental conflict between a single State and the rights of citizens throughout the nation to engage in National Political Party activities. Even in the state context, moreover, courts have acknowledged as a constitutional right "the inherent power of a political party to adopt principles and policies and to require its members and especially its officials, to adhere thereto" and "the inherent right of a political party to expel any official whose actions and beliefs are antagonistic to announced principles." *Anderson* v. *Millikin*, 186 Wash. 602, 59 P.2d 295, 297 (1936). Petitioners are not aware of any reported state court decision upholding an injunction against persons participating in a state political party convention or meeting.

It is significant that the law in Illinois as announced by the Illinois Supreme Court is entirely consistent with the position announced by this Court on July 7, 1972 in *Keane* v. *National Democratic Party* and in the cases cited above. In *People* v. *McWeeney*, 259 Ill. 161 (1913), the defendant faced a situation substantially identical to that of the petitioners here. An Illinois lower court had enjoined the defendant from participating in the nominating meeting of a political organization. Thereafter, the defendant was prosecuted for violating the injunction. The Supreme Court of Illinois held:

> "The general rule is well established that the judicial department of the government has no right to interfere with or attempt to control a citizen in the exercise of political rights unless the jurisdiction is expressly given by statute or by clear implication. On account of the grave consequences which might result both to the courts and the people if the courts were to take jurisdiction of political matters, it has always been held that they have no right to interfere in those matters at all. The courts cannot be drawn into political contests of any sort or description unless required by statute, and *any injunction for the purpose of restraining or controlling acts of a political nature is void and may be disobeyed without accountability to the court.*" (Emphasis added.) 259 Ill. at 172.

Thus, in granting the last minute injunction against petitioners in this case, Judge Covelli ignored not only the binding *res judicata* effect of the prior decisions in *Keane*, but also ignored the law as enunciated by the Supreme Court of Illinois in *McWeeney*.

In the entire history of credentials contests at our National Party Conventions there is not a single precedent for the action of the Illinois court in enjoining participation in such a Convention.* When faced with the issue, every state and Federal court—with the exception of the Illinois courts in this case—has rejected the proposition that state law exclusively governs the seating of National Convention delegates and that persons not selected in accordance with state law may therefore be enjoined from participating in a National Party Convention.

D. The Nomination of Candidates For President and Vice President Of the United States Is a Matter Within the Power of the National Political Parties.

1. No State has power to dictate to, or restrict or veto activities of, a National Political Party in relation to the nomination of candidates for President or Vice President of the United States.

Article II, Section 1 of the Constitution gives to each State the power to "appoint, in such Manner as the Legis-

* See also Brooks, *Political Parties and Electoral Problems* 326 (1933). ("They [the National Conventions] may . . . admit or reject delegations at will regardless of the primary election laws of any state"); Goodman, *The Two-Party System in the United States* 602 (1964) ("decisions [certifying election results] even by state officials would not be binding on a national convention"); Portnoy, "Freedom of Association and the Selection of Delegates to National Political Conventions," 56 *Cornell L. Rev.* 148, 149 (1970) ("Whatever the law, the national convention's power to judge the qualifications of delegates thereto has apparently never been challenged, so the party has the means to enforce its rules on delegate selection"); Schmidt and Whalen, "Credentials Contests at the 1968—and 1972—Democratic National Conventions," 82 *Harv. L. Rev.* 1438, 1457 (1969) |"[T]he National Convention cannot be bound by a given state's laws to seat delegates chosen in accordance with those laws").

lature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress. . ." The 12th Amendment in turn prescribes the manner in which the Electors shall choose the President and Vice President of the United States. The States' power to appoint Electors may constitutionally be exercised in a variety of ways. See generally *McPherson* v. *Blacker*, 146 U.S. 1, 28-35 (1892). To the extent an electoral process for appointing electors is established by a State, it must adopt procedures for nominating candidates for Elector, and in most States such nominations are made by the state party committees. See Longley & Braun, *The Politics of Electoral Reform* 29 (1972).

There is nothing in the Constitution, however, which gives to the States any role in the selection of nominees for President and Vice President of the United States. Such nominees have been selected by the National Political Parties in various ways since the founding of the nation.

The initial Presidential nominations—after the election of George Washington who was chosen by "national consensus" not requiring any real nomination—were made by caucus of the members of Congress belonging to the different National Parties. See Goodman, *The Two-Party System in the United States* 151-53 (1964). Jefferson, Madison, Monroe and John Quincy Adams were chosen as Presidential nominees by this caucus method. *Id.*

The caucus method of choosing Presidential nominees fell out of favor in the 1820's and Andrew Jackson campaigned against it—derisively labelling it "King Caucus" —in 1824. See R. Goldman, *The Democratic Party in American Life* 42 (1968). The next few years were ones of "experimentation with forms" for making Presidential

nominations. Goodman, *supra* at 163. Nomination of Presidential candidates by state legislatures or state conventions was tried to some extent in 1824 and 1828, but "the appropriateness of any kind of state machinery for national organization was very dubious even if it were feasible." *Id.* at 163.

By the 1830's, commentators note, "The transportation system of the county was improving; for the first time, geographical barriers were being surmounted sufficiently to permit a national congregation." Goodman, *supra,* at 163. Thus, 1832 saw the first National Party Conventions and by 1840 this new method of making presidential nominations was well-established. See Davis, *Springboard to the White House* 22-25 (1967). Pursuant to a Call issued by the National Party Committee, delegates have assembled every Presidential election year, allocated among the various States in accordance with a variety of formulas which have evolved over the years.*

There is no constitutional restriction upon a National Political Party's adopting alternative mechanisms for making Presidential nominations such as a national primary, regional processes, the caucus system or a Convention with diverse methods of selecting delegates.** Certainly there is nothing in the Constitution which requires that a National Party give any recognition at all to a State, as a unit, in its nominating process:

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* The Conventions have also, on the whole, seated representatives from the various Territories (in some cases without voting rights), although in the nineteenth century this was often a contested issue. See, *e.g.*, 1868 Republican Proceedings at pp. 13-14; 1876 Democratic Proceedings at pp. 40-42.

** For recent proposals see, e.g., *New York Times,* April 8, 1972 at 12 (proposed regional processes); *Task Force on Democratic Party Rules and Structure of the Coalition for a Democratic Majority, Toward Fairness & Unity for 1976* at 10-11 (1973) (proposal to seat all Senators and Congressmen in the National Conventions).

"For reasons of political expedience and convenience, the parties in practice have chosen to focus their procedures for the selection of delegates to the national nominating conventions upon the various states. If, however, the national parties should choose to abandon the states in favor of some other geographical subunit for purposes of delegate selection, the Constitution would not impede them. For example, the parties could focus their delegate selection procedures on a regional basis using the federal judicial circuits or the federal executive regions as the appropriate geographical units for selecting delegates to their national conventions." Blumstein, "Party Reform, the Winner-Take-All Primary, and the California Delegate Challenge: The Gold Rush Revisited," 25 Vand. L. Rev. 975, 988 (1973).

What the decision of the Illinois Appellate Court amounts to is a holding that because a National Party chooses to allocate a portion of its Convention delegates on the basis of state boundaries (or to districts within a particular State), the National Party thereby forfeits entirely to the State its fundamental right to determine who shall participate in its National Convention and what rules, standards and principles its delegates are obligated to uphold. There is no constitutional support for such a holding.

The one common characteristic which must be maintained by any alternative mechanism for nominating a Presidential candidate is that it must ultimately be a national process. The objective is to choose a candidate who can achieve a nationwide majority of the electoral votes. As stated in *Bode* v. *National Democratic Party*, 452 F.2d 1302 (D.C. Cir. 1971):

"In the arena of Presidential politics, the primary function of a national party convention . . . is to select among a field of available persons Presidential and Vice-Presidential candidates most competent to perform the duties of office, yet capable of attracting a sufficient number of popular votes to carry the requisite number of States in the election. This process of sorting and unification requires a judgment exercised toward maintaining and enlarging party appeal on a national scale." 452 F.2d at 1309.

See also *Irish* v. *Democratic-Farmer-Labor Party*, 287 F. Supp. 794, 805, aff'd, 399 F.2d 119 (8th Cir. 1968). The States may decide to appoint their Electors in a variety of ways; but "a party must be organized nationwide in order to command a majority of the elector votes." Goodman, *supra*, at 33.

The concept of a State being able to restrict the freedom to engage in such a Presidential nominating process is contrary to its inherently national character. A National Party establishes and operates its nominating process with a view to achieving its national political objectives—particularly nominating and electing a President and Vice President of the United States. Particular States (and their legislatures and courts) may or may not approve of particular National Party processes or actions—*e.g.*, the Illinois courts disapproved the seating of petitioners in the 1972 Democratic National Convention, a court in Mississippi disapproved the seating of the Mississippi "Loyalists."*

* An extreme instance of such local disapproval of National Party activities is contained in the proceedings of the Republican National Conventions prior to and during the Civil War and Reconstruction eras when Republican delegates from the southern States frequently reported facing mobs and threats of violence for attending a Republican National Convention. See, *e.g.*, 1860 Republican Proceedings at pp. 112-113.

A National Party may choose not to have a National Convention at all, or to allocate delegates by regions, or not to allocate any delegates to a particular State, or to have all of the delegates from a State consist of designated officeholders. Subject to possible constitutional limitations not involved in this case (or conceivably to Congressional regulation), these are matters within the ultimate power of the National Political Parties and not the States. There is, of course, nothing in the Constitution which *bars* any State from conducting a process for the selection of National Convention delegates. But a State cannot dictate to a National Party that it accept certain State-approved delegates, notwithstanding applicable National Party rules and principles.

This Court has recognized that there are certain rights of citizens which are inherent in the constitutional structure of our national government. In *Crandall* v. *Nevada,* 73 U.S. 35 (1867), this Court upheld the constitutional right of citizens to travel freely from State to State. This Court stated:

> "The people of these United States constitute one nation. They have a government in which all of them are deeply interested. This government has necessarily a capital established by law, where its principal operations are conducted.
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> That government has a right to call to this point any or all of its citizens to aid in its service, as members of the Congress, of the courts, of the executive departments, and to fill all its other offices; and this right cannot be made to depend upon the pleasure of a State over whose territory they must pass to reach the point where these services must be rendered.
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> • • •

> "But if the government has these rights on her own account, the citizen also has correlative rights. He has the right to come to the seat of government to assert any claim he may have upon that government, or to transact any business he may have with it. To seek its protection, to share its offices, to engage in administering its functions. He has a right to free access to its seaports, through which all the operations of foreign trade and commerce are conducted, to the subtreasuries, the land offices, the revenue offices, and the courts of justice in the several States, and this right is in its nature independent of the will of any State over whose soil he must pass in the exercise of it." 73 U.S. at 43-44.

The right of citizens to participate in a Presidential nominating process—to join together with citizens of other States to try to choose a nominee who can obtain a nationwide majority in the Electoral College and lead the nation as President—is a right of this fundamental character.

In addition to its other sources of protection, this right of citizens to participate in National Party affairs is protected from state interference by the Privileges and Immunities Clause of the Fourteenth Amendment. Mr. Justice Harlan, dissenting in *Shapiro* v. *Thompson,* 394 U.S. 618 (1968), noted that this Court has consistently adopted a restrictive view of the Privileges and Immunities Clause:

> "The view of the Privileges and Immunities Clause which has most often been adopted by the Court and by individual Justices is that it extends only to those 'privileges and immunities' which 'arise or grow out of the relationship of United States citizens to the national government.' Hague v. CIO, 307 U.S. 496, 520 (1939) (opinion of Stone, J.)" 394 U.S. at 667.

Even under this restrictive view, the right to attend a National Party Convention or otherwise participate in a national process to select and promote a nominee for President of the United States is protected by the Privileges and Immunities Clause.

In *Hague* v. *CIO*, 307 U.S. 496 (1939), Mr. Justice Stone stated:

> "The privileges and immunities of citizens of the United States . . . are confined to that limited class of interests growing out of the relationship between the citizen and the national government created by the Constitution and federal laws." 307 U.S. at 520, n. 1 (opinion of Mr. Justice Stone).

Mr. Justice Roberts in his opinion in the same case stated that the Privileges and Immunities Clause of the Fourteenth Amendment protected the right of citizens to assemble peacefully to discuss the merits of Federal legislation. 307 U.S. at 512.

In *United States* v. *Cruikshank*, 92 U.S. 542 (1876), this Court stated:

> "*The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for anything else connected with the powers or the duties of the National Government, is an attribute of national citizenship and, as such, under the protection of and guaranteed by, the United States.* The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances." 92 U.S. at 568-69. (Emphasis added.)

In that case, this Court held that the right of free assembly generally is protected by the First Amendment, but that the right to assemble for the purposes of petitioning Congress "or for anything else connected with the powers and duties of the National Government" is additionally protected, as an attribute of United States citizenship, by the Privileges and Immunities Clause of the Fourteenth Amendment. The right to assemble together to nominate and promote a candidate for President of the United States is, therefore, protected by that Clause.

In the *Slaughterhouse Cases*, 83 U.S. 36 (1873), Mr. Justice Miller stated that: "The right to peaceably assemble and petition for redress of grievances . . . are rights of the citizen guaranteed by the Federal Constitution." 83 U. S. at 79.

The applicability of the Privileges and Immunities Clause leaves open the possibility of Federal Congressional restrictions upon the activities of National Political Parties in the Presidential nominating process. See *Burroughs and Cannon* v. *United States*, 290 U.S. 534 (1934). *Cf. Shapiro* v. *Thompson*, 394 U.S. 618, 668 (1969) (dissenting opinion of Mr. Justice Harlan).* It is possible that certain types of national regulation of National Political Parties could be reconciled with the freedom of political association guaranteed by the First Amendment. But just as the unexercised power of Congress to regulate interstate commerce limits the States in attempting to do so, see, *e.g.*, *Polar Ice Cream & Creamery Co.* v. *Andrews*, 375 U.S. 361 (1964); *Bibb* v. *Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959), by analogy the absence of Congressional regulation of internal processes of National Political Parties is an additional signal that

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* Congress may also have certain powers to regulate National Political Parties in connection with enforcement of other provisions of the Fourteenth and Fifteenth Amendments. See, *e.g.*, *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966).

they should be free of the kind of state restriction attempted to be imposed by the Illinois Appellate Court in this case. See also *City of Burbank* v. *Lockheed Air Terminal,* 411 U.S. 624, 625 (1973), quoting, *Cooley* v. *Board of Port Wardens,* 53 U.S. 299, 319 (1851) ("Whatever subjects of [the power to regulate commerce] are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to require exclusive legislation by Congress.")

As stated by Judge Will, for the 50 States to determine "the qualifications and eligibility of delegates to national political party conventions" is "an obviously intolerable result." (A.-13.) It is contrary to the inherently national character of the Presidential nominating process—and in conflict with the constitutional right of citizens of the United States to engage in that process—for any State to be able, as the Illinois court asserts, to bar the application by a National Party Convention of its own national rules and principles and to bar the participation in such a Convention of persons whom the assembled delegates have voted to seat.

2. No Violation of the Constitutional Rights of Respondents Is Involved in This Case.

The Illinois Appellate Court grounded its decision on the unprecedented proposition that "[t]he right to sit as a delegate representing Illinois at the national nominating convention is governed exclusively by the Illinois Election Code." (A.-139.) However, the Illinois court also engaged in an extensive review of the actions of the 1972 Democratic National Convention, the Credentials Committee, and the Hearing Examiner, and concluded that "the due process and equal protection rights" of respondents were

violated and that the actions of petitioners and the National Democratic Party in this case were unconstitutional. (A.-150.)

The statements of the Illinois Appellate Court represent an extraordinary assertion of power to consider constitutional claims of respondents in the present posture of this case. In the first instance, these statements of the Illinois Appellate Court are directly contrary to the final judgment of the Court of Appeals for the District of Columbia issued on February 16, 1973 in respondents' Washington, D.C. Federal court action. There can be no dispute that the constitutional claims of respondents under the equal protection and due process clauses of the Fourteenth Amendment were fully and finally adjudicated in that action. In that case, the Court of Appeals for the District of Columbia, on remand from this Court, stated:

> "[T]he 1972 Convention of the National Democratic Party, acting within its competence, seated at the Convention the delegation [petitioners] whose right thereto was contested by plaintiffs, Keane, et al., [respondents] in the District Court." 475 F.2d at 1288.

The Court of Appeals affirmed the judgment of the District Court below, dismissing respondents' complaint, over the objection of respondents who unsuccessfully sought to have the District Court judgment vacated and dismissed. See discussion at pp. 13, 35-39, *supra.* Respondents did not seek any review of the February 16, 1973 judgment of the Court of Appeals.

Further, respondents have asserted that they are not raising constitutional issues in this case nor do they claim that their constitutional rights have been violated; rather, they ground their claim solely on state law. Indeed when petitioners sought to remove this case to the Federal

District Court for the Northern District of Illinois, respondents vigorously asserted in a motion to remand the case to the Circuit Court of Cook County that no constitutional issues were presented by their complaint. As a result, Judge Will remanded the case to the Circuit Court of Cook County. (A.-8.)*

Irrespective of the foregoing, and considering the statements of the Illinois Appellate Court with regard to the constitutional issues on their merits, petitioners submit that those statements are clearly erroneous.

To begin with, the Illinois Appellate Court wholly ignores what this Court previously described as the "highly important question" of "whether the action of the Credentials Committee is state action." 409 U.S. at 4. Lower Federal courts have noted the difficulty posed by this requirement in the context of National Political Party activities. See *Irish* v. *Democratic-Farmer-Labor Party of Minnesota,* 399 F.2d 119 (8th Cir. 1968); *Smith* v. *State Executive Committee of Democratic Party of Georgia,* 288 F. Supp. 371, 375 (N.D.Ga. 1968). The Illinois court makes no findings of any kind which would warrant a conclusion that the activities of the National Democratic Convention are "state action" subject to the Fourteenth Amendment. Indeed, the court describes the National Convention as "a voluntary association," which is inconsistent with any such notion. Elsewhere the court states that due process and equal protection rights have been "abrogated by the actions of defendants [petitioners]." It is difficult to see

* "Plaintiff's action was commenced in the Circuit Court of Cook County for a declaration of rights and injunctive relief under state statutes. . . . No federal question is presented by the complaint." Motion of Wigoda, et al. for Remand and Temporary Restraining Order Pending Ruling, filed April 24, 1972, at p. 2.

how the actions of petitioners—a group of citizens who chose to bring a challenge to the seating of respondents under rules and procedures established by the National Democratic Party—could, under any conceivable theory, constitute "state action" within the meaning of the Fourteenth Amendment. See, *e.g., Moose Lodge No. 107* v. *Irvis,* 407 U.S. 163, 171-179 (1972). Compare *Reitman* v. *Mulkey,* 387 U.S. 369 (1967); *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715 (1961).

The Illinois Appellate Court's statement that respondents' "due process" rights were violated appears to be premised on the court's examination of the findings of the Hearing Examiner appointed by the National Democratic Party. As noted earlier, the Examiner was the Honorable Cecil F. Poole, former United States Attorney for the Northern District of California. Examiner Poole held hearings in Chicago, received evidence and heard argument from both sides, and issued the Report (A.-20.), which was presented to the National Party's Credentials Committee.

The Appellate Court's references to that Report are, almost without exception, erroneous. The Poole Report did not "ignore the State law," as the Appellate Court states (A.-139.); the Report expressly acknowledged that respondents were elected at the Illinois primary (A.-24.) and that the Democratic Party in Illinois had taken steps to bring the Illinois Election Code into conformity with the National Party Rules (A.-29.). Moreover, respondents were wholly free and vigorously exercised the right to argue in the Credentials Committee and in the National Convention that, because of their election in accordance with state law, they should be seated in the Convention.

The Poole Report did not state that the underrepresentation of racial minorities, women and young people on the delegation was "proof of actual discrimination by itself" as the Appellate Court quotes (A.-139.). The Appellate Court leaves out the word "not" in the quotation. The Poole Report states:

> "It [such underrepresentation] would *not*, however, be proof of actual discrimination by itself." (Emphasis added.) (A.-37.)

It is on the basis of its misquotation of the Poole Report on the last point that the Illinois Appellate Court concludes that there was "deliberate distortion of the facts by the hearing examiner" (A.-139.).

The fact is that the Democratic Party's procedures in relation to the Chicago credentials contest in 1972 were among the most extensive and fair in political party history. The National Democratic Party Rules themselves were laid down explicitly in the official Call of the National Convention more than a year before the Convention.* When petitioners instituted the challenge, an Examiner was appointed and hearings were held in which respondents participated fully. Subsequently, respondents argued their case—on whatever grounds they chose—before the Credentials Committee and the National Convention. It is not at all clear that a National Political Party is obligated to engage in any such elaborate procedures; the more customary practice has been for contests to go directly to the Credentials Committee (or the National Committee) and then to the floor of the National Convention for decision.

* Respondents have never argued that the actions of the National Party were not taken in accordance with explicit and announced National Party Rules. The Hearing Examiner noted, among other things, testimony that Mayor Richard J. Daley told a meeting of the Chicago committeemen that he "didn't give a damn" about the Rules. (A.-30.)

With regard to a possible violation of "equal protection rights" the Illinois Appellate Court's statements are even more cryptic. (A.-150.) Respondents were found to have deliberately violated explicit and announced National Party Rules. No claim or finding was made in the court below that those Rules were unconstitutional. (Such a claim was, of course, made by respondents and rejected by the Court of Appeals for the District of Columbia prior to the 1972 Democratic National Convention.) The statement of the Illinois Appellate Court appears to mean that the enforcement of *any* National Party Rules in relation to a primary election violates the equal protection clause. It is conceivable that the equal protection clause would prohibit a National Party from establishing and enforcing certain types of rules.* But it is difficult to see on what basis the Fourteenth Amendment could be read to prohibit enforcement of *any* rules or principles in relation to delegates chosen in a primary election. In effect the Illinois Appellate Court merely restates as involving "equal protection" its basic assertion that the Illinois Election Code "exclusively governs" the qualifications of National Convention delegates. When respondents asserted their equal

* See the dissenting opinion of Mr. Justice Marshall and cases cited therein. 409 U.S. at 6. It should be noted that even those courts which have held that the actions of National Political Parties are subject to constitutional limitations under the Fourteenth Amendment have acknowledged that those limitations must be interpreted in a manner which gives recognition to the wide range of factors which are a legitimate part of political party decision-making. See, *e.g.*, *Bode* v. *National Democratic Party*, 452 F.2d 1302 (D.C. Cir. 1971).

protection claims prior to the 1972 Democratic National Convention, the Court of Appeals for the District of Columbia rejected them unanimously, stating:

> "The Democratic National Party determined to make participation in the nomination process as democratic as possible. This exercise of the Party's power over the qualifications of the delegates to its convention was pursuant to a reasonable regulation calculated to achieve a permissible, indeed laudable, end. The action of the Credentials Committee [in seating petitioners instead of respondents] was taken on the basis of a clear and constitutional rule. . . . Moreover, the rule had been announced—and understood—as applicable to the selection of delegates prior to the election process." (A.-54.)

E. Credentials Contests Should be Decided by the National Political Parties Themselves and Not By the Courts.

When this controversy came before the Court initially, this Court noted that "judicial intervention in this area has traditionally been approached with great caution and restraint." 409 U.S. at 4. Petitioners submit that the history of this litigation demonstrates the wisdom of a policy of judicial nonintervention into such controversies.

If the Illinois courts can intervene into credentials contests at National Political Party Conventions, then so can the courts of the 49 other States. In at least three contests (Mississippi, California and Illinois) Federal courts were asked to intervene immediately prior to the 1972 Democratic National Convention. Even if cases are brought in state courts and plaintiffs (like respondents in this case) purport to frame their complaints on grounds of state law,

Federal constitutional issues will continually arise in defense of such actions. Given the stakes involved in such controversies (as evidenced by this Court's decision to come into special session to decide the California and Chicago cases in 1972), such contests must inevitably come to this Court for final resolution.

The Court of Appeals in *Irish* v. *Democratic-Farmer-Labor-Party of Minnesota*, 399 F.2d 119 (8th Cir. 1968), noted that only in cases involving racial discrimination have courts generally been willing to interfere in the internal operations of political parties:

> "The courts, generally and consistently, have been reluctant to interfere with the internal operations of a political party. Lynch v. Torquato, 343 F.2d 370 (3 Cir. 1965); Democratic-Farmer-Labor State Central Committee v. Holm, 227 Minn. 523, 3 N.W.2d 831, 833 (1948). In our opinion this attitude of non-interference is an appropriate starting point. We recognize, however, that the Supreme Court and other tribunals, in cases having racial factors, have in fact, on constitutional principles, thwarted invidious discrimination in party primaries and in other political maneuvers. Smith v. Allwright, 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987 (1944), and Terry v. Adams, 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152 (1953), are examples of this. There is nothing here, however, with racial overtones or anything akin thereto." 399 F.2d at 120.

Similarly, this Court, in its decision to allow the National Convention to decide the Chicago and California contests in 1972, noted the absence of claims of racial discrimination as a basis for judicial intervention:

> "This is not a case in which claims are made that injury arises from invidious discrimination based on race in a primary election within a single state. Cf.

> Terry v. Adams, 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152 (1953); Smith v. Allwright, 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987 (1944)." 409 U.S. at 4.

Indeed, in the instant case it is *petitioners* who alleged racial discrimination by respondents in their pre-primary slating activities and the Democratic Party's Hearing Examiner found respondents had so discriminated "invidiously and substantially." (A.-38.) It is the right of the National Democratic Party to enforce rules *against* such racial discrimination, among other things, which is now at stake. Petitioners and the National Democratic Party were acting to uphold the very constitutional principles which this Court established in *Smith* v. *Allwright, supra,* and *Terry* v. *Adams, supra.*

In rejecting the request for judicial interference into political party affairs in *Irish* v. *Democratic-Farmer-Labor Party,* 399 F.2d 119 (8th Cir. 1968), the Eighth Circuit also noted that "the issues raised by the plaintiffs-appellants are the subject of a formal challenge lodged within the time allowed by the party rule with the Credentials Committee of the Democratic National Committee." 399 F.2d at 121. Cf. *Smith* v. *State Executive Committee of Dem. Party of Georgia,* 288 F. Supp. 371 (N.D. Ga. 1968) (noting the existence of "obvious political and legislative remedies"). Similarly, this Court in denying judicial relief to respondents and the California plaintiffs prior to the 1972 Convention noted that its action "will not foreclose the Convention's giving the respective litigants in both cases [Chicago and California] the relief they sought in federal courts." 409 U.S. at 3. See also *Riddell* v. *National Democratic Party,* 344 F.Supp. 908 (S.D. Miss. 1972) (appeal pending, 72-2437, 5th Cir.), in which the court denied

injunctive relief but advised the National Democratic Party to give a full hearing to both contesting delegations before its Credentials Committee. The availability of other avenues of relief to those who seek to involve the courts in credentials controversies has been emphasized by commentators. See, *e.g.,* Note, "Constitutional Law— Justiciability—Credentials Disputes", 1973 Wis.L.Rev. 1191, 1202.

Every student of National Political Conventions has emphasized the intangible and delicate factors and relationships which go into Convention decision-making:

> "[T]his one occasion for national operation accentuates or reveals the tensions of ambition and the competitiveness of faction. The most savage struggles can ensue, the most violent passions unleased. Nor is the unity of interest and objective complete in a national convention. Motives and specific objectives vary among the thousands of men and women who take part. Ramifications multiply as the geographical area of party organization widens." Goodman, *supra,* at 213.

A range of complicated and often subjective factors has historically gone into the decisions on credentials contests. Courts are incapable of considering the intangibles of such political bargaining. Often the balancing of competing factors has led the National Conventions to compromise contests by splitting or reconstituting delegations in various ways (see pp. 54-67, *supra*). The political process involved may actually extend over a period of years—with decisions at one Convention generating commitments which are relevant in later years and so on. See generally Mayer, *The Republican Party 1854-1966* (1967); Goldman, *The Democratic Party in American Politics* (1966). This kind of political

process—attuned to a National Political Party's own evolving principles and interests—is abrogated if the resolution of such controversies is vested in the courts.

Moreover, by their nature, credentials contests do not arise until the period immediately prior to the National Political Party Convention. At that time the political struggle over the Presidential nomination is intense. If such contests are justiciable, then the lower courts—and ultimately this Court—are put in the posture of determining, or at a minimum affecting in a direct and immediate way, who the Presidential nominees will be. Any interference in the process by judicial action—even any delay in determining whether there will be judicial action—has acute political consequences. As Mr. Justice Harlan wrote:

> ". . . timing is of the essence in politics. It is almost impossible to predict the political future; and when an event occurs, it is often necessary to have one's voice heard promptly, if it is to be considered at all." *Shuttlesworth* v. *Birmingham,* 394 U.S. 147, 163 (1968) (concurring opinion).

To render such contests the subject of judicial determination is to involve the courts in matters which they are ill-equipped to decide, as to which no "judicially manageable standards" are available, and under circumstances which inevitably embroil the courts in intense and immediate political controversies.

Petitioners submit such political contests are a matter which the citizens associating together in a National Political Party should be allowed to decide for themselves.

III.

PETITIONERS' RIGHT TO A FAIR HEARING AS GUARANTEED BY THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION WAS DENIED IN VIEW OF THE PUBLIC STATEMENTS CONCERNING THIS CASE MADE BY THE TRIAL JUDGE WHILE THE INSTANT CASE WAS PENDING BEFORE SAID TRIAL JUDGE, WHICH STATEMENTS DEMONSTRATED A GROSS BIAS AND PREJUDICE AGAINST PETITIONERS.

The trial judge below publicly advised respondents to enforce his injunctive orders in a Florida state court and compared the situation to Nazi Germany. The comments are quoted at pages 18-19, *supra.*

The Illinois Appellate Court, basing its decision upon (1) a party's right to only one change of venue under the Illinois Venue Act and (2) the fact that the trial judge made his statements only after issuing his original order, refused to vacate the trial court's orders on this ground. (A.-151.) However, the relief sought was not grounded upon any statutory right to a change of venue but upon the constitutional guarantee of a trial before "an unbiased judge." This right is essential to due process. *Holt* v. *Virginia,* 381 U.S. 131, 136 (1964). *Cf. Irwin* v. *Dowd,* 366 U.S. 717, 722 (1961); *Tumey* v. *Ohio,* 273 U.S. 510, 522 (1926). It is axiomatic that "trial before 'an unbiased judge' is essential to due process." *Johnson* v. *Mississippi,* 403 U.S. 212, 216 (1971). The fact that the trial judge's statements were made after his original order was issued does not alter the demonstration of bias they represent. Further, the statements were made prior to the trial judge's supplemental order of August 2, 1972.

This Court's previous decisions have held that petitioners had a right to a hearing before an impartial judge, which they did not receive. The judgment should be reversed, if for no other reason, because of extreme bias manifested toward petitioners by the trial judge.

IV.

THIS CASE DOES NOT PRESENT "MOOT AND ABSTRACT" QUESTIONS.

Respondents contend for the first time in their Brief in Opposition to the Petition for Certiorari, pages 15-17, that the issues presented in the instant case are "moot and abstract." * This view is erroneous for at least three substantial reasons.

1. For almost two years since the 1972 Democratic National Convention, respondents, publicly and in court, have pursued petitioners for alleged contempt of the July 8, 1972 order of the Circuit Court of Cook County appealed

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* In pleadings filed in the Court of Appeals for the District of Columbia on January 23, 1973, respondents themselves stated that this case is not moot:

> "The case on appeal [in the Illinois Appellate Court] appears to present a 'live' controversy in view of the supplemental injunction which pertains to present representation of Illinois in the Democratic National Committee." Suggestion of Keane, et al. that the Instant Cause Be Dismissed in *Keane* v. *National Democratic Party*, Civil No. 72-1631 (D.C. Cir., January 23, 1973) p. 4.

Moreover, respondents never argued in the Illinois Appellate Court that the instant case presented "moot and abstract" questions, nor, of course, did the Illinois Appellate Court consider the case to present such questions.

from herein. The trial judge, after issuing rules to show cause against 62 of petitioners, has deferred criminal contempt trials (which the judge has stated may be lengthy and in which petitioners are threatened with jail sentences), conditioned upon rapid prosecution by petitioners of this appeal. Thus petitioners clearly have a "substantial stake" in the validity of the initial order appealed from and petitioners are threatened with severe "disabilities or burdens" if the judgment below is not reversed. *Cf. Carafas* v. *LaVallee*, 391 U.S. 234, 237-8 (1968); *Ginsberg* v. *New York*, 390 U.S. 629, 633 (1968).

As noted, the trial judge has deferred the contempt trials pending disposition of the proceedings in this Court. There is no basis for the suggestion of respondents that the trial judge might go forward with contempt proceedings even if his orders are reversed by this Court. The Circuit Court of Cook County was patently without jurisdiction or power to dictate which contesting delegation should be seated in the Democratic National Convention. Moreover, there is no logic or precedent to support the suggestion that petitioners might be punished for disobeying a patently invalid order under circumstances where the effect of the order, if obeyed, would have been irrevocably to deprive the National Democratic Party of its right to decide the Chicago contest and irrevocably to deny petitioners their right to participate in the Convention in accordance with the Convention's decision. Further, this Court (as well as the Court of Appeals for the District of Columbia) had decided the issues in the case in the Federal court action instituted by respondents. The subsequent contrary order of the Circuit Court of Cook County was, as counsel for the Democratic National Committee stated in post-convention pleadings filed in the Court of Appeals, "transparently in-

valid" in light of those prior decisions.* For these reasons alone, therefore, cases such as *Walker* v. *City of Birmingham*, 388 U.S. 307 (1967), which indicate that, under some circumstances not present here, an unconstitutional order of a state court must nevertheless be obeyed, have no applicability.

2. The Circuit Court's supplemental order of August 2, 1972, affirmed by the Illinois Appellate Court, bars petitioners from participating in the selection of members of the Democratic National Committee to serve until 1976, despite the fact that the Rules of the National Democratic Party provide that the delegates seated at the 1972 Convention are entitled to choose the National Committee members. The persons chosen by the August 5, 1972 caucus in which respondents participated (as a result of the Circuit Court's supplemental order) have served in the National Committee during the interim period, pending prosecution (at such time as the Circuit Court's order should be vacated) of the challenge filed by petitioners with Democratic National Committee.

3. The holding of the Illinois Appellate Court that a National Political Party Convention is "without power or authority" to deny seats to persons chosen as delegates in accordance with state law (A.-149) and that persons so chosen have "a legal right [to be seated] properly protected by the courts" (A.-144), notwithstanding contrary rules and decisions of the National Political Party, presents a critical question of continuing public importance for the functioning of the American political party system. It is difficult to exaggerate the significance of that decision, if valid, for the functioning of American political parties and their national presidential nominating conventions. The instant case therefore raises a recurring question of fundamental importance which warrants a decision on the merits by this Court *even if* the judgment below did not have the continuing, critical consequences for petitioners discussed above. Cf. *Storer* v. *Brown*, 94 S.Ct. 1274, 1282, n.8 (1974); *Rosario* v. *Rockefeller*, 410 U.S. 752, 756 n.5 (1973); *Dunn* v. *Blumstein*, 405 U.S. 330, 333 (1972); *Moore* v. *Ogilvie*, 394 U.S. 814, 816 (1969); *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498, 515 (1911).

* Counsel for the National Democratic Party also stated:
"At every stage of this litigation, the National Democratic Party has taken the position that under the Constitution no courts—state or federal—may interfere in the internal affairs of a national political party, except possibly in exceptional circumstances not present in this case. That position was adopted, on at least a preliminary basis, by the Supreme Court in its ruling in this case." Response of Joseph A. Califano, Jr., et al., Counsel for National Democratic Party and Democratic National Committee in *Keane* v. *National Democratic Party*, Civil No. 72-1631 (D.C. Cir. November 27, 1972 at p. 1).

CONCLUSION

For the reasons set forth herein, petitioners respectfully pray that the judgment of the Illinois Appellate Court be reversed.

Respectfully submitted,

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